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EXTRADITION REFORM ACT OF 1981

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 5227

EXTRADITION REFORM ACT OF 1981

JANUARY 26 AND FEBRUARY 3, 1982

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EXTRADITION REFORM ACT OF 1981

TUESDAY, JANUARY 26, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes, Conyers, Hall, and Sawyer.

Staff present: Hayden W. Gregory, chief counsel; David Beier, assistant counsel; and Deborah K. Owen, associate counsel.

Mr. HUGHES. The Subcommittee on Crime of the House Judiciary Committee will come to order.

This morning the Subcommittee on Crime opens a series of hearings on the reform of American laws relating to extradition. On December 15, 1981, I introduced H.R. 5227, the Extradition Reform Act of 1981. As I indicated at the time of introduction, this bill grew out of a concern that our current extradition laws were not sufficient to meet the challenges of transnational crime. Through this set of hearings we hope to receive testimony from various interested parties about the legal and practical problems that exist under our current extradition laws. We also hope that various witnesses will make suggestions about reforms in the laws that will enable us to more effectively respond to the increased level of terrorism and drug trafficking on the international level.

The bill that is the subject of our hearing today is an attempt to improve current Federal law while at the same time retaining the basic framework for processing extradition cases. I think that many of the changes suggested by the bill are relatively noncontroversial and acceptable to both the administration and persons who represent individuals being sought for extradition. Among these salutary changes are provisions authorizing the appointment of counsel, clarification of the requirements of the facts and/or documents that must be in a complaint, and authority for both parties to obtain appellate review of extradition decisions. There are, however, in addition to these less controversial improvements, several areas of policy where various commentators and experts have already expressed some strong differences of opinion.

The two major areas of controversy involve the issue of bail and the question of who should decide the so-called political offense question.

The first area of controversy is with respect to the political offense question. Historically, the United States and most Western

nations have cooperated in the extradition of persons sought for common crimes. Since the 1840's, however, there has been a conspicuous exception to our treaty obligations to extradite, that is, the political offense exception. This doctrine is based on the view that sovereign states should be required to cooperate in the return of a person who is being sought for a political crime, such as the advocacy of overthrowing the government of a foreign state.

Decisions concerning whether a person committed a political offense have been made by the Federal courts for more than 100 years. During that time the Congress has never given the courts any statutory guidance with respect to what does or does not constitute a political offense. The definitions of political offense that have evolved through court decisions have not been reviewed or rationalized. Moreover, the Government has been prevented from obtaining appellate review of lower court decisions because there is no authority to appeal such decisions.

The provisions of H.R. 5227 attempt to resolve the two major problems that exist in current Federal law with respect to the political offense question. First, the bill sets forth a definition of what is and what is not a political offense question. Second, the bill authorizes the Government to obtain appellate review.

Some witnesses testifying in the other body on a related bill have suggested that decisions on the political offense question be left to the unguided and unfettered discretion of the Secretary of State. Some have argued that because decisions relating to political offenses can have an impact on our foreign relations, they should only be made by the executive branch. This argument has been rejected as a matter of constitutional law in the seventh and second circuits in recent cases. The courts in those cases held that extradition, including the political offense question, without judicial oversight is highly dangerous and ought never to be allowed in this country.

Thus, it seems to me that the burden of coming forward with evidence of why the courts should be deprived of jurisdiction to decide political offense questions rests with the proponents of that view. Specifically, advocates of that view will have to establish to the satisfaction of this body that whatever problems exist under current law with respect to the political offense question are not adequately addressed by the bill before this subcommittee, H.R. 5227.

The issue of bail in extradition cases appears to be relatively straightforward. Under current law there is no statutory authority for the granting of bail in extradition cases. There is, however, a long line of judicial precedent, going back to a 1904 Supreme Court case, indicating that a person sought for extradition may be released pending a hearing if there are special circumstances. Because one of the most important reasons for this legislation is clarification of questions unresolved by current law, it is appropriate to set forth the circumstances under which a person should be eligible for release or detention pending an extradition hearing. The provisions of H.R. 5227 resolve that issue by providing Federal courts with the authority to release a person sought for extradition on bail. The considerations to be used by the court in making this type of decision are set forth in the bill, as are the conditions that may be imposed.

In light of the possibility of extradition cases involving charges against Americans and the authority in the bill for provisional arrests for up to 60 days, the bill provides for access to judiciary release pending a hearing. The bill modifies substantially the existing Federal bail law by eliminating any presumption in favor of release, and by requiring that the court impose conditions that will assure that the person will appear for a hearing. In addition, the bill requires the court to take into account the alleged fugitivity of the person being sought and the need to honor our treaty obligation. Finally, the bill for the first time in Federal law would permit the Government to appeal decisions concerning release conditions that they felt were not sufficient. In sum, I believe that the bail provisions of H.R. 5227 provide a rational set of standards to govern the release decision pending an extradition hearing.

[A copy of H.R. 5227 follows:]

I

97TH CONGRESS
1ST SESSION

H. R. 5227

To amend title 18 of the United States Code with respect to extradition, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 15, 1981

Mr. HUGHES introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18 of the United States Code with respect to extradition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1981".

SEC. 2. Chapter 209 of title 18 of the United States Code is amended—

(1) by striking out section 3181 and inserting in lieu thereof the following:

"§ 3181. Payment of fees and costs

"All costs or expenses incurred in any proceeding under this chapter in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.";

(2) in section 3182, by adding at the end the following: "An agent appointed as provided in this section who receives the fugitive into custody is empowered to transport the fugitive to the State or Territory from which the fugitive fled.";

(3) by striking out "or the Panama Canal Zone" in the first sentence of section 3183;

(4) by striking out section 3184 and all that follows through section 3195; and

(5) so that the chapter heading and the table of sections at the beginning of the chapter read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"Sec.
"3181. Payment of fees and costs.
"3182. Fugitives from State or Territory to State, District or Territory.
"3183. Fugitives from State, Territory, or possession into extraterritorial jurisdiction of the United States."

SEC. 3. Title 18 of the United States Code is amended by inserting after chapter 209 the following new chapter:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. General statement of requirements for extradition.
"3192. Complaint and preliminary proceedings.
"3193. Waiver of hearing.
"3194. Hearing and order.

"§ 3191. General statement of requirements for extradition

"The United States may extradite a person to a foreign state in accordance with this chapter only if—

"(1) there is an applicable treaty concerning extradition between the United States and such foreign state;

"(2) the foreign state requcsts extradition in accordance with the terms of that treaty; and

"(3) the appropriate court issues an order under this chapter that such person is extraditable.

"§ 3192. Complaint and preliminary proceedings

"(a)(1) The United States district court for the district in which the person sought to be extradited is found may issue an order in accordance with this chapter that such person is extraditable, upon a complaint filed by the Attorney General.

"(2) If the Attorney General has previously sought an order that a person is extraditable under this chapter with respect to a specific extradition request of a foreign state the Attorney General may not file another complaint under this section based upon the same factual allegations as a previous complaint, unless the Attorney General shows good cause for filing another complaint.

"(b) A complaint under this section shall—

"(1) be made under oath or affirmation;

"(2) specify the offense for which extradition is sought;

"(3) contain any matter not otherwise required by this chapter but required by the applicable treaty concerning extradition; and

"(4) either—

"(A) be accompanied by—

"(i) a copy of the request of the foreign state for extradition; and

"(ii) the evidence and documents required by the applicable treaty concerning extradition; or

"(B) contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement—

"(I) of the essential factual allegations of conduct constituting the offense that the person sought is believed to have committed; or

"(II) that a judicial document authorizing the arrest or detention of such person on account of accusation or conviction of a crime is outstanding in

the foreign state seeking extradition; and

"(iii) a description of the circumstances justifying such person's arrest.

"(c) The Attorney General may file a complaint under this chapter in the United States District Court for the District of Columbia if the Attorney General does not know where the person sought may be found. When the person is found, the matter shall be transferred to the United States district court to which the person arrested is taken under subsection (d) of this section.

"(d) Upon the filing of the complaint under this section, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to such person to appear at an extradition hearing under this chapter. The warrant or summons shall be executed and returned in the manner prescribed for the execution and return of a warrant or summons, as the case may be, under the Federal Rules of Criminal Procedure. A person arrested under this section shall be taken without unnecessary delay before the nearest available United States district court for further proceedings under this chapter.

"(e) Unless otherwise provided by the applicable treaty relating to extradition, the court shall order the release, pending the extradition hearing, of a person arrested under

this section if there has not been filed with the court before the end of 60 days after the arrest of such person the evidence and documents required by the applicable treaty relating to extradition or notice that such evidence and documents have been received by the Department of State and will promptly be transmitted to the court.

"§ 3193. Waiver of hearing

"(a) A person against whom a complaint is filed under this section may, with the consent of the Attorney General, waive the requirements of this chapter for a hearing by informing the court that such person consents to removal to the foreign state requesting extradition. Such a waiver may not be revoked unless the court determines that an extraordinary change of circumstances warrants such revocation.

"(b) The court shall—

"(1) inform a person making a waiver under this section of such person's right to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel; and

"(2) inquire of such person and determine whether such waiver is—

"(A) voluntary and not the result of threat or other improper inducement; and

"(B) given with full knowledge of its legal consequences.

"(c) If the court determines the waiver is one described in subsection (b)(2) (A) and (B) of this section, the court shall order the person making such waiver extraditable and certify a transcript of the court's proceeding in the matter to the Secretary of State. The Attorney General shall notify the foreign state requesting extradition of the order of extradition and the time limitation under section 3198 of this title on detention of the person sought. The Attorney General shall, except as otherwise provided by this chapter, surrender the person so ordered extraditable to the custody of an agent of the foreign state requesting extradition.

"§ 3194. Hearing and order

"(a) The court shall, as soon as practicable after arrest or summons of the person sought to be extradited, hold a hearing to determine issues of law and fact with respect to a complaint filed under section 3192 of this title unless such hearing is waived under section 3193 of this title.

"(b)(1) At a hearing under this section, the person sought to be extradited has the right—

"(A) to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel;

"(B) to confront and cross-examine witnesses; and

"(C) to introduce evidence with respect to the issues before the court.

"(2) The guilt or innocence of the person sought to be extradited of the charges with respect to which extradition is sought is not an issue before the court.

"(c) The court shall inform the person sought to be extradited of the purpose of the hearing and of the rights described in subsection (b) of this section.

"(d)(1) Except as otherwise provided in this chapter, the court shall order a person extraditable after a hearing under this section if the court finds—

"(A) probable cause to believe that the person before the court is the person sought;

"(B)(i) probable cause to believe that the person before the court committed the offense for which such person is sought; or

"(ii) the evidence presented is sufficient to support extradition under the provisions of the applicable treaty concerning extradition; and

"(C) the conduct upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(i) the United States;

"(ii) the majority of the States of the United States; or

"(iii) the State where the fugitive is found.

"(2) The court shall not order a person extraditable after a hearing under this section if the court finds—

"(A) such person is charged with an offense with respect to which the limitations provided by the applicable treaty concerning extradition, or, if such treaty provides none, the limitations of the law of the prosecuting State, on commencement of prosecution have run; or

"(B) the applicable treaty concerning extradition provides an applicable defense against extradition.

"(e)(1)(A) Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State.

"(B) Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State.

"(2) Any issue as to whether the foreign state is seeking the extradition of a person for a political offense shall be determined by the court in accordance with the following principles:

"(A) Unless the offense is also an offense described in subparagraph (B) of this paragraph, a political offense normally includes an offense consisting of—

"(i) sedition;

"(ii) treason; or

"(iii) unlawful political advocacy but only if the advocacy is not to engage imminently in violence under circumstances in which it is likely that such advocacy will imminently incite such violence.

"(B) A political offense normally does not include—

"(i) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970;

"(ii) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

"(iii) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

"(iv) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense;

"(v) an offense that consists of homicide, assault with intent to commit serious bodily injury, rape, kidnaping, the taking of a hostage, or serious unlawful detention;

"(vi) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

"(vii) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or

"(viii) an attempt or conspiracy to commit an offense described in clauses (i) through (vii) of this subparagraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

"(f) The court shall state the reasons for its findings as to each charge or conviction, and certify—

"(1) a transcript of its proceedings in the case of an order or extraditability; or

"(2) such report as the court considers appropriate in other cases;

to the Secretary of State.

"(g)(1) Documents at a hearing under this section may be authenticated as provided—

"(A) in the applicable treaty concerning extradition;

"(B) in the Federal Rules of Evidence for proceedings to which such Rules apply; or

"(C) by the applicable law of the foreign state, and authentication under this subparagraph may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer.

"(2) An affidavit by an appropriate official of the Department of State is admissible in a hearing under this section as evidence of the existence of a treaty relationship between the United States and a foreign state.

"(3) The court may consider hearsay evidence and properly certified documents in a hearing under this section.

"(h) If the applicable treaty relating to extradition requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense were committed in the United States, the requirement is satisfied by evidence establishing probable cause to believe that the offense was committed and that the person sought committed that offense.

"(i) The court shall, upon petition after notice to the Secretary of State by a person ordered extraditable under this section, dismiss the complaint against that person and dissolve the order of extraditability if that person has not been extradited to the requesting state by the end of 45 days (excluding any time during which extradition is delayed by judicial proceedings) after the Secretary of State receives the certified transcript of the proceedings from the court, unless the Attorney General shows good cause why such petition should not be granted.

"§ 3195. Appeal from determination after hearing

"(a)(1) Any party may appeal in accordance with the Federal Rules of Appellate Procedure applicable to criminal cases the determination of the court after a hearing under section 3194 of this title.

"(2) Such appeal shall be heard as soon as practicable after the filing of notice of appeal. Pending determination of such appeal, the district court shall stay the operation of the

court's final order with respect to the extradition of the person found extraditable or the dismissal of the complaint.

"(3) If the Attorney General appeals the determination, the court to which appeal is made may, upon motion of the Attorney General, order the person held whose extradition was sought in the hearing from which appeal is made, if the Attorney General shows that such person presents a risk of flight or poses a danger to the community, and the probability of the appeal's success is high.

"(b)(1) No court shall have authority to review in any proceeding, other than an appeal proceeding under this section, the extraditability of a person appealing under this section until the conclusion of such appeal.

"(2) No court shall have jurisdiction to entertain a petition for habeas corpus or a proceeding for other review with respect to a finding of extraditability after a hearing under section 3194 of this title if such finding has been upheld in any previous appeal or an opportunity to appeal was not taken, unless the court finds that the grounds for the petition or other review could not previously have been presented by such habeas corpus or other proceeding or, in the case of an appeal not taken, the court finds good cause existed for not taking the appeal.

"§ 3196. Surrender of a person to a foreign state after hearing

"(a) If a person is ordered extraditable after a hearing under this chapter the Secretary of State, in such Secretary's discretion, may order the surrender of the person (even if such person is a national of the United States, unless such surrender is expressly forbidden by the applicable treaty concerning extradition or the laws of the United States) to the custody of an agent of the foreign state requesting extradition, and may condition that surrender upon any conditions such Secretary considers necessary to effectuate the purposes of the applicable treaty concerning extradition or the interest of justice.

"(b) The Secretary of State, upon ordering or denying surrender absolutely or conditionally under this section, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that ordered the person extraditable. If surrender is ordered under this section, the Secretary of State shall also notify the diplomatic representative of the foreign state of the time limitation under section 3198 of this title on detention of the person sought.

"§ 3197. Receipt of a person from a foreign state

"(a) The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. Such agent shall have the

authority of a United States marshal, and shall convey such person to the Federal or State jurisdiction that sought such person's return.

"(b) If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on condition that such person be returned to such foreign state at the end of criminal proceedings in the United States the Attorney General shall hold such person in custody pending the end of such proceedings and shall then surrender such person to an agent of such foreign state unless the foreign state declines to accept such person.

"§ 3198. Definitions and general provisions for chapter

"(a) As used in this chapter—

"(1) the term 'foreign state'—

"(A) used in other than a geographic sense, means the government of a foreign state; and

"(B) used in a geographic sense, includes all territory under the jurisdiction of a foreign state, and includes—

"(i) any colony, dependency, or constituent part of such foreign state; and

"(ii) the air space, territorial waters, and vessels and aircraft registered in such foreign state;

"(2) the term 'treaty' means a treaty, convention, or other international agreement that is in force after advice and consent of the Senate;

"(3) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands; and

"(4) the term 'United States district court' includes the District Court of Guam, the District Court of the Virgin Islands, and the District Court of the Northern Mariana Islands, and Guam, the Virgin Islands, and the Northern Mariana Islands are, respectively, the districts for such District Courts.

"(b) The court may order a person found extraditable under this chapter held until surrendered to an agent of the foreign state, or until the Secretary of State declines to order such person's surrender.

"(c)(1) A person arrested or otherwise held under this chapter shall be treated in accordance with chapter 207 (relating to release) of this title, as modified for this purpose by this subsection, as if the person were held in connection with an offense with respect to which such chapter applies.

"(2) If the judicial officer decides to release the person arrested or otherwise held under this chapter, the judicial officer may impose any of the conditions set forth in section 3146 of this title that the judicial officer determines will

assure appearance as required, assure the safety of the community, and carry out the obligations of the United States under the applicable treaty concerning extradition, without regard to the order in which such conditions are so set forth.

"(3) In determining which conditions set forth in section 3146 of this title to impose, the judicial officer shall also take into account whether the person whose extradition is sought is attending an educational institution, whether the person is lawfully in the United States, and the existence of any other requests for the extradition of such person other than the one with respect to which release is sought.

"(4) The Attorney General may appeal from a decision to release under this subsection to, and seek the revocation of such release or a change in the conditions imposed with respect to such release in, the court having appellate jurisdiction over the court in which such decision was made. Any order so appealed shall be affirmed if the order is supported by the proceedings below. If the order is not so supported, the court may, with or without additional evidence, modify the decision appealed. The appeal shall be determined promptly.

"(d) The court shall upon request appoint counsel as provided in section 3006A of this title for cases to which such section applies to represent a person whose extradition

is sought, with respect to whom a complaint is filed under this chapter, and who is financially unable to obtain counsel.

"(e) All transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of the government of a foreign state, a State, or the United States shall be borne by the requesting government unless specified in the applicable treaty concerning extradition or, in the case of a request of the government of a foreign state, the Secretary of State directs otherwise.".

SEC. 4. The table of chapters at the beginning of part II of title 18 of the United States Code is amended by striking out the item relating to chapter 209 and inserting in lieu thereof the following:

SEC. 5. This Act shall take effect on the first day of the first month which begins on or after 180 days after the date of the enactment of this Act, and shall apply only with respect to extradition and rendition proceedings commenced after such taking effect.

Mr. HUGHES. The subcommittee will be hearing testimony today from representatives of the U.S. Departments of Justice and State. In addition, we will receive testimony from a distinguished professor of international law, Richard Falk.

Noting a quorum, the Chair has received a request to cover this hearing, in whole or in part, by television broadcast, radio broadcast, still photography, or by other similar methods. In accordance with committee rule 5(a), permission will be granted unless there is an objection. Is there an objection? Hearing none, such coverage is permitted.

The Chair recognizes the ranking minority member from Michigan, Mr. Sawyer.

Mr. SAWYER. I have no statement at this time, Mr. Chairman.

Mr. HUGHES. Our first two witnesses will appear in a panel. They represent the Departments of State and Justice.

Mr. Roger Olsen, Deputy Attorney General of the Criminal Division, will represent the Department of Justice. Representing the Department of State is Daniel W. McGovern, deputy legal adviser.

Both Departments of State and Justice have been intimately involved in the development of legislative suggestions for the reform of the extradition laws of the United States. In addition, the Department of Justice has played a key role in clarifying existing law through its litigation activities. The Department of State, with assistance from Justice, has also in recent years negotiated some dramatic changes in the extradition area through the treaty process.

We are delighted to have you with us this morning. We have your statements. At least we have the statement of the Department of Justice and we hope that perhaps you can summarize for us and we will go to questions. Mr. Olsen, let us start with you.

TESTIMONY OF ROGER OLSEN, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY MICHAEL ABBELL, CRIMINAL DIVISION, OFFICE OF INTERNATIONAL AFFAIRS, AND DANIEL W. McGOVERN, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. OLSEN. Thank you, Mr. Chairman. I would like to introduce with me Michael Abbell from the Criminal Division, Office of International Affairs, who has participated quite heavily in the preparation of our statements this morning, as well as in the draft of the bill.

I ask that my written statement be made a part of the record, and that I confine my remarks strictly to the bail and political offense issues.

Mr. HUGHES. Without objection, those statements will be admitted for the record.

Mr. OLSEN. On the question of bail, I agree with the remarks that the Chair has made regarding the reasonableness of the position of H.R. 5227. The real issue as we view it is who should have the burden of coming forward with establishing the criteria for release for bail. It seems to us that the standards, whether they are in the special circumstances test or in H.R. 5227, are basically one and the same with some slight nuances and differences, but in the

main I think the court would have ample opportunity to review all the attendant facts and circumstances.

The difference is in the question of who should come forth and present to the court those facts. It is the view of the Justice Department that those facts in the case of an extradition proceeding would be best satisfied by the requested person and through his counsel. We believe that that would satisfy any questions of due process that could be construed in this matter, and any questions of fairness as we wish to be viewed by foreign countries.

I listed the special circumstance factors in my statement for the purpose of indicating to the court that the decision is really as to who has the burden of going forward. The question then is not whether or not there would be a right to bail but merely a question of who would have the burden of coming forth and establishing those facts and circumstances, facts and circumstances which in the main the Justice Department would not have evidence of.

On the question of the political offense, I think there are two reasons why we believe at Justice that there has been a tendency for a breakdown in the ability of our courts to process extradition questions. One has to do with the nature of a political offense and whether it is subject to a justiciable standard. The other has to do with whether or not the courts and the Department of Justice are even equipped to litigate issues involving internal affairs of foreign countries.

A recent editorial in the New York Times on December 29 pointed out the lack of consistency between court decisions involving extradition requests for what were otherwise deemed acts of terrorism. In the one case, the *Abu Eain* case, the extradition request from Israel for acts involving placing of a bomb in a marketplace which subsequently exploded, killing two minor children and injuring many others, the end result of that extradition proceeding was that the requested person was extradited to Israel. The other case, the *Mackin* case, involved an extradition request from Great Britain for the shooting of an off-duty plainclothesman. A Federal court deemed that the offense there was in the nature of a political offense and extradition was denied. There are other cases that we see more and more of involving acts of violence that are somehow linked to acts of political behavior and motive.

The courts, we find because of our participation in the proceedings, tend to beg the question by looking into questions involving the totality of violence or civil disruption existing in a foreign country, as well as the acts of violence of the individual perpetrator. In *Abu Eain* the court heard testimony for a week on—and I quote from the Seventh Circuit Court of Appeals—the nature of the conflict in the Middle East before, during, and after the 1948 Proclamation of the State of Israel. In *Mackin* testimony was heard involving the conflict between the English and the Irish since the 17th century. In *McMullen,* the same type of evidence was introduced.

In all those cases the Government responded by the use of expert testimony, if you will, from the State Department presenting to the court the fact that in the view of the State Department these were acts of terrorism and not in the nature of political offenses. It is our view that there is no justiciable standard to the political of-

fense issue and that the courts have been struggling to find a standard. The inability of the courts to resolve it has resulted in a search, if you will, for some criteria for standards upon which to make the decision. I think it is clear that the Justice Department is simply not equipped nor are the courts to look into the internal affairs of a foreign country to make that kind of a determination. We simply do not have that capability.

The question of whether we ought to or not is a question that I could address later after the State Department expresses its views. But from the standpoint of operation of our judicial machinery, the courts and the Justice Department are not familiar with these types of issues, whether or not there has been a state of violence existing in a foreign country for a certain period of time.

I might add that on that question, that threshold question of whether there has been a state of violence, it has been pointed out that if one is to look to some statistic such as the number of shootings, the number of robberies, or something like that, there are probably more individual acts of that type of violence within our large urban metropolitan areas within the United States than there are in many of the foreign countries that we look to on the question of whether or not there is a resolvement.

I submit that on a basis of what historically has happened with the courts that the political offense issue is one that we are not equipped to handle. I will submit my remarks.

Mr. HUGHES. Thank you, Mr. Olsen.

[The prepared statement of Roger M. Olsen follows:]

PREPARED STATEMENT OF ROGER M. OLSEN

Mr. Chairman and Members of the subcommittee, thank you for the opportunity to appear before this subcommittee today on behalf of the Department of Justice to express its views on H.R. 5227—a bill, developed by the staff of this subcommittee in consultation with the Department of Justice, to modernize the very outdated United States statutes which implement our extradition treaties.

As you know, the criminal division of the Department of Justice is responsible for advising Federal and State prosecutors in preparing extradition requests to foreign countries, processing those requests, and serving as liaison with the appropriate foreign and State Department officials in connection with the execution of those requests. It also is responsible for the representation, or the supervision of the representation, of foreign extradition requests in our Federal courts.

The Federal laws implementing this country's extradition treaties have changed little in the 100 to 140 years since their original enactment. They were designed for a world in which the United States was largely protected from international criminal activity by its geographical location and the slowness and difficulty of international travel and communications. Until 1970, it was rare for the United States to make or receive more than ten extradition requests in any one year. By 1980, extradition requests had climbed to well over 200 per year.

The increase in extradition requests made or received is attributable to the great growth of international travel and high speed telecommunications, this country's growing awareness of its responsibility to the international community and to itself in effectively combatting transnational criminal activity. These factors also support the proposition that extradition requests shall continue to increase even further into the foreseeable future. As the table appended to my statement indicates, the number of extradition requests made by and to the United States, as well as the number of actual extraditions, has nearly tripled in the past four years, and is roughly ten to twenty times as great as the average annual number of requests and extraditions during the 1960's.

The volume of extradition requests we are presently making and receiving, and the expected continued rapid growth in this volume, plainly requires effective Federal laws to implement our treaty responsibilities. Present Federal laws simply do not fulfill these needs. Moreover, because of the substantial translation and trans-

portation costs frequently attendant to international extraditions, the cases in which the United States and foreign countries seek extradition are generally among the more important cases being prosecuted by the respective authorities. Approximately one-third of these cases relate to serious crimes of violence, another one-third to serious narcotics offenses, and the remaining one-third to serious white collar crimes.

H.R. 5227 generally will enable the United States to much more efficiently and effectively meet its extradition responsibilities in the 1980's and subsequent decades. By permitting us to more effectively respond to foreign requests and to remove foreign criminals from our midst, H.R. 5227 should enable us to improve our success in securing our own requests for extradition from foreign countries.

Like S. 1940, which was developed by representatives of the Department of Justice and State and the staff of the Senate Judiciary Committee, H.R. 5227 will make the following significant improvements in United States extradition laws:

(1) It will permit the United States to obtain a warrant for the arrest of a foreign fugitive although his location or even his presence in the United States is not actually known. The entry of such warrants in the National Crime Information Center (NCIC) and the Treasury Enforcement Communications Systems (TECS) should greatly facilitate the arrest of such fugitives.

(2) It will provide a statutory procedure for waiver of extradition for foreign fugitives apprehended in the United States. This procedure will greatly facilitate the expedited return of such fugitives if they do not wish to contest their extradition.

(3) It will permit the direct appeal of court orders granting or denying extradition rather than forcing fugitives to use the more cumbersome habeas corpus review process and denying any review to countries requesting extradition, except through the extremely circuitous and undesirable route of filing a new extradition complaint before a different judge.

(4) It will establish clear statutory procedures and standards for the handling and litigation of all critical phases of the extradition process.

(5) It will limit access to our courts in extradition cases to those cases filed by the United States Attorney General ("Attorney General").

(6) It will permit the Attorney General to ask for the issuance of a summons rather than a warrant of arrest where he believes there is no risk that the person sought will flee prior to the court's decision.

(7) It will codify the rights of foreign fugitives to legal representation in extradition cases and to the speedy resolution of those cases.

(8) It will stop the United States from being a haven for Americans who commit crimes abroad and who cannot be extradited under many of our older treaties which preclude U.S. citizens from being extradited to foreign countries.

(9) It will facilitate the temporary extradition of fugitives to the United States who are serving sentences or being tried in foreign countries.

While we believe there should be some relatively minor clarifications in H.R. 5227 with respect to some of the above matters, and while we have a definite preference for the S. 1940 waiver of extradition and appeal sections, we believe that H.R. 5227 is otherwise acceptable, except in its treatment of the political offense exception to extradition and in its handling of the release of fugitives pending extradition (bail). The technical changes the Departments of Justice and State recommend are identified and discussed in a joint memorandum. We ask the subcommittee's permission to place this memorandum in the record of these hearings. Let me discuss briefly, the political offense exception and the bail provision, respectively.

H.R. 5227 would give the courts the responsibility for determining whether a foreign country is seeking the extradition of a person for a political offense. We strongly believe that this determination is one that should be made by the Secretary of State and not by the courts. The United States could be perceived as a haven for terrorists if every extradition proceeding could result in protracted public hearings on whether or not the requested person committed a political offense.

Exactly what is a political offense, the courts have never, to date, been able to adequately postulate and with good reason. There is no justiciable standard. A political offense may apparently be either "pure" or "relative," terms which are now used by our courts. A "pure" political offense is supposed an act directed against the State but which contains none of the elements of an ordinary crime. Examples of such a "pure" political offense usually cited are: treason, sedition, and espionage. An example which provides a vehicle for examining the weakness of this approach is one in which two British spies stole highly confidential State secrets from Great Britain and sold them to an Eastern Bloc country. Had their treachery been discovered at a time they were in the United States, rather than after they had fled to the Soviet Union, and had the "pure" political offense rule been applied, their extradi-

tion from the United States probably would have been barred. Such an anomalous result is obviously not in the best interests of this country.

A "relative" political offense is apparently one in which a common crime is so connected with a political act that the entire offense is regarded as political. A recent example of this exception was an extradition proceeding where the criminal offense involved the setting of a bomb in an Israeli marketplace killing two minor children and injuring more than thirty other people. The requested person claimed first he did not do it. But if he did do it, the charges constituted a "relative political offense" on the grounds that there was and is conflict in Israel that involves violence and the organization to which he belonged was a party to that violence. The Federal court in this proceeding heard testimony for one week on "the nature of the conflict in the Middle East before, during, and after the 1948 proclamation of a State of Israel . . . as well as the 1967 occupation by Israel of the West Bank of the country of Jordan." This example points out, I submit, the nature of the problem facing the Justice Department in its efforts to honor, on behalf of the U.S., its treaty obligations. That problem is two-fold: (1) the opportunity for a public forum to raise these sensitive matters, and (2) the inability of the Justice Department to examine and controvert evidence.

The second significant exception the Department of Justice takes to H.R. 5227 is on the bail provision. The present United States extradition laws do not expressly provide for the release of the person sought pending the courts decision on his extraditability. The only mention of a matter relating to the incarceration or release of a foreign fugitive under the present law is in 18 U.S.C. 3184 which provides for mandatory incarceration after the court finds the person sought extraditable, but is silent on the subject beforehand. Despite the lack of bail release provisions under the present law, the courts have released alleged fugitives on bail pending the extradition hearing where the latter demonstrate to the court's satisfaction that "special circumstances" require such release. Courts which have released a person sought on bail prior to the extradition hearing frequently have continued such release after finding him extraditable, despite the plain language of section 3184 to the contrary, where the fugitive notifies the court that he intends to seek habeas corpus review of the court's finding. In the great majority of cases, however, courts applying the special circumstances test, have declined to release alleged fugitives.

The Justice Department has found, based upon our actual court experience, that the following factors are determinative of "special circumstances." No significance should be attributed to the order of factors listed below.

(1) The status in the United States of the requested person (U.S. citizen, nonresident alien, etc.).

(2) Nature of offense involved (hijacking, drug trafficking, white collar crime, etc.) and potential danger/harm to U.S. community if requested person is released.

(3) Continuing flight by use of concealed whereabouts and/or use of alias as opposed to living openly; also, was original entry in the U.S. legal or was it secured by fraudulent or other illegal means?

(4) Status of offense—Conviction of offense versus charged, but untried, offense.

(5) Circumstances about requested person's departure from foreign country making the request (escape from prison; bond jumping; departure after charged and/or arrested, etc.).

(6) Family and/or financial ties of the requested person within the United States (large personal investment in U.S. business), presence and status (citizenship, permanent residents, etc.) of immediate family.

S. 1940 would continue to apply this court developed special circumstances test to the release on bail of persons sought for extradition by foreign countries. It specifically provides for release on bail under this standard during the prehearing and appeal stages. It also provides for a much more liberal standard for the release on bail pending appeal of persons found not extraditable.

Based on our experience in operating over the years with the special circumstances test as it has been developed by the courts, the fact that persons sought for extradition by foreign countries are by definition fugitives from justice, and the great damage to our foreign relations if we are not able to meet our treaty obligations to surrender foreign fugitives apprehended and found extraditable in the United States, we strongly support the approach to the release on bail question taken by the Senate bill rather than the modified Bail Reform Act approach taken by H.R. 5227. Additionally, it should be noted that both the House and Senate bills for the first time, provide for the use of summons rather than a warrant of arrest in those cases in which the Attorney General believes there is no risk that the person sought will flee pending the extradition hearing. It is contemplated that in those cases in which a summons is used, the United States would not oppose release on

bail at least until such time as the person is found extraditable or reliable information of probable flight is received.

H.R. 5227, with the modifications recommended by the Departments of Justice and State, particularly in the areas of the political offense exception and release on bail, will result in a major improvement in this country's ability to meet its international extradition responsibilities in an era in which criminals, including terrorists, increasingly attempt to use international boundaries to frustrate law enforcement efforts. If H.R. 5227 is modified in accordance with our recommendations, the Department of Justice strongly supports its enactment.

U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION

[Extradition]

	1978	1979	1980	1981 (estimate)
Number of fugitives requested per calendar year:				
Foreign	55	76	86	100
U.S. Federal	46	51	81	90
U.S. State	(1)	(1)	57	80
Total fugitives requested	101	127	224	270
Number of fugitives surrendered each year: [2]				
Foreign	20	36	35	45
U.S. Federal	19	25	34	45
U.S. State	(1)	(1)	15	20
Total fugitives surrendered	39	61	84	110

[1] Handled by legal advisor, Department of State. No statistics ever kept by it. Best estimate is that State requests never exceeded 20 in any year and were probably much less.
[2] Surrender equals extradited, waived extradition, deported, returned voluntarily.

JOINT STATEMENT OF CHANGES IN H.R. 5227

(Recommended by the Department of State, in supplementation of their testimony before the Subcommittee on Crime of the House Committee on the Judiciary)

In addition to the problems about which the Departments of Justice and State have testified, with respect to the political offense exception and the bail release provisions of H.R. 5227, there are a number of less fundamental and more technical changes which both Departments believe need to be made in the bill if it is to better achieve the goals of the Subcommittee on Crime and the Departments of Justice and State. This statement sets forth these changes and the reasons that we recommend that they be made.

Section 3192(c).—This subsection provides that whenever a person is provisionally arrested for extradition and the documents required by the applicable treaty are not filed with the court or received by the Department of State within sixty days, the person arrested shall be released from custody. Section 3192(d)(2) of S. 1940 provides that in such circumstances the arrested person may be released. In the majority of cases, the threat that the arrested person will be released, if the requesting country does not provide the necessary documents in a timely manner, serves the salutary purpose of encouraging the requesting country to act quickly in order to minimize the pre-hearing period of incarceration of the arrested person. However, there are instances in which the requesting country cannot provide the documents within the sixty day period because of such factors as airline strikes, inclement weather, etc. There are also cases in which the extradition documents are voluminous and, while the requesting country provides a set of the documents in its own language in a timely manner, it cannot get them translated within that period. In such cases, we believe the court should have the discretion to continue the incarceration of the arrested person for a reasonable period of time. For these reasons, we recommend that the word "shall" in the second line of this subsection be changed to "may."

Section 3193.—This section sets forth the procedures governing the waiver of extradition under the applicable treaty where the fugitive wishes to return to the requesting country without contesting his extradition. It is similar to Section 3193 of S. 1940. However, we believe the language of the Senate bill is more clear and,

therefore, preferable. The reasons of our preference for the language of the Senate bill are:

(1) It makes it clearer that the fugitive is waiving not only his right to an extradition hearing, but also his right to have the order of extraditability reviewed by the Secretary of State before his surrender is ordered.

(2) The transcript of the waiver proceeding is an official record of the court before which the waiver is taken. Since the Secretary of State plays no further role in the removal of a fugitive who waives extradition, no purpose is served by requiring that the transcript of the waiver proceeding be sent to him.

(3) Since the requesting country is in effect the client of the Attorney General, there is no need to statutorily require him to notify that country of the waiver—it will be done automatically.

(4) Since the fugitive will always be in the custody of the Attorney General—i.e., the United States Marshal—the Attorney General always will be the official who surrenders the fugitive.

Therefore, if the last sentence of Section 3193(c) is necessary, there should be a similar sentence added to Section 3196(b).

Section 3194(b)(1)(B).—This subsection provides that the person sought has the right to confront and cross examine witnesses. This language could be read to imply that the person sought has the right to confront and cross examine all of the witnesses whose statements and affidavits constitute, in whole or in part, the evidence and documents required by the applicable treaty. It is clear that the drafters of this bill had no intention of requiring the requesting country to send witnesses to the United States to make out the necessary case under the applicable treaty. See Section 3194(g)(3). The costliness and impracticability of such a practice would effectively preclude extradition to the United States, and, within a very short period, extradition by the United States from foreign countries. Consequently, in order to clarify this subsection, the words "who testify against him" should be inserted after the word "witnesses." A similar qualification of the right of confrontation is contained in Section 3194(b)(2) of S. 1940.

Section 3194(e)(1) (A) and (B).—Since not all United States extradition treaties provide for the defenses to extradition enumerated by these subsections, the phrase "under the applicable treaty concerning extradition" should be inserted after the word "issue" in the first line of each of these subsections.

Section 3194(g)(1)(A).—On October 15, 1981, the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents entered into force for the United States. This Convention was intended to provide a streamlined system for the legalization (authentication) of documents in civil matters. There is no reason why it should not also be used with respect to the legalization of documents in connection with extradition proceedings. Consequently, we believe the language of this subsection should be changed to read "(A) in an applicable treaty" rather than "(A) in the applicable treaty concerning extradition." Section 3194(c)(1)(A) of S. 1940 uses similar phraseology.

Section 3194(g)(3).—It is clear in the context of the legislation that this subsection was intended to carry forward the present judicially developed rule that an extradition court, like a federal court conducting a preliminary hearing under the Federal Rules of Criminal Procedure, may base its decision in whole or in part on hearsay and/or documentary evidence. However, as this subsection is presently drafted, it only provides that the extradition court may consider such evidence. Therefore, we recommend that the phrase "and may base its decision in whole or in part on such evidence" be inserted at the end of this subsection. Section 3194(d)(4) of S. 1940 uses the recommended terminology.

Section 3194(i).—This subsection was intended to provide that the Secretary of State should have forty-five days from his receipt of the certified transcript of the court proceedings, as a result of which the fugitive was found extraditable, to order the fugitive's surrender. The drafters then intended to give the requesting country an additional thirty days to remove the fugitive from the United States. See Sections 3193(c) and 3196(b) and the comments below on Section 3198. The use of the phrase "if that person has not been extradited to the requesting state," however, would appear to require both that the Secretary order the surrender, and that the fugitive be removed from the United States within the forty-five day period. Such a time limit is too short, particularly where the fugitive asks the Secretary to consider special factors which are within his sole discretion (see Section 3194(e)(1)), or where he asks the Secretary to impose conditions on his surrender in order to afford him protection against some real or imagined problem after his return to the requesting country. For the above reasons, the phrase in question should be amended to read "if the Secretary has not ordered that person surrendered.

We also recommend that the word "reasonable" be inserted after the word "after" in the first line of this subsection in order to make it clear that the Secretary must be given the opportunity to have the Attorney General intervene to show "good cause" why the fugitive's petition should not be granted. As the subsection reads now, the court could grant the petition five minutes after the Secretary is notified. This result was plainly not the intention of the drafters.

Section 3195.—H.R. 5227 makes two improvements over the Senate bill's appeal section by citing the Federal Rules of Appellate procedure generally, rather than citing a specific rule whose number may be changed, and by staying the dismissal of the complaint as well as the fugitive's extradition pending appeal. Nevertheless, we believe that the appeal section of the Senate bill with the incorporation of the two improvements in the House bill discussed above, is more clearly drafted and is preferable for the following additional reasons:

(1) The House bill keys the availability of bail pending appeal to which party brings the appeal rather than to the result in the extradition court. Thus, under the House bill the Government has the burden of proving the fugitive should remain incarcerated during the pendency of the appeal even if he has been found extraditable on one or more of several charges for which his extradition is being requested and the Government is only appealing the rulings on the charge or charges for which he was not found extraditable.

(2) The requirement that the fugitive exhaust his remedies in the appeal can be circumvented under the House bill if "good cause" is shown. In S. 1940, the fugitive must show that the grounds invoked in the habeas corpus challenge "could not have been presented" earlier.

(3) Paragraph (b)(1) speaks of the court's "authority" whereas paragraph (b)(2) speaks of the court's "jurisdiction." It would be preferable to consistently use the term "jurisdiction" as in the Senate bill.

Section 3198.—As mentioned above, it is obvious that the drafters of the House bill inadvertently left out a subsection or paragraph setting the period within which the requesting country must remove the fugitive after the Secretary of State has ordered his surrender. See Sections 3193(c) and 3196(b). Such a provision was contained in earlier drafts of the bill and, through clerical error, was evidently not included in the bill as introduced. This provision could either be a new paragraph (2) in Section 3198(b) or a new subsection (e). In either case, we recommend that it be worded as follows:

"The court shall, upon petition after reasonable notice to the Secretary of State by the person ordered extraditable under Section 3193 or Section 3194, dismiss the complaint against that person and dissolve the order of extraditability if that person has not been removed from the United States within thirty days after surrender has been ordered unless the Attorney General shows good cause why such petition should not be granted.

Mr. HUGHES. Mr. McGovern.

Mr. MCGOVERN. Thank you, Mr. Chairman, members of the committee. Once again, please accept my apologies for the fact that apparently through some slip-up of our congressional relations office, the prepared statement which I submitted last week, Thursday, I believe it was, somehow failed to appear in your offices. I would ask that the statement be submitted for your record. I have one copy with me which I will submit at the conclusion of my testimony, and I will furnish other copies as soon as I return to my office.

Mr. HUGHES. Without objection your statement will be received in full for the record.

Mr. MCGOVERN. Thank you. I will briefly highlight the position taken in that statement which is consistent with the testimony I gave before the Senate Judiciary Committee on S. 1940, the Senate version of this legislation.

Regarding the three aspects of H.R. 5227 which are of greatest interest to the Department of State, the Department supports the bill insofar as it provides that only the Attorney General has authority to initiate extradition proceedings. The Department supports the bill insofar as it provides that the parties have a right of

direct appeal from court orders granting or denying extradition. However, the Department urges that the bill be changed to provide, as does S. 1940, that the Secretary of State has exclusive jurisdiction to determine whether the crime for which extradition is requested is a political offense or an offense of a political character.

Thank you, Mr. Chairman. I would be available to answer any questions you might have.

[The prepared statement of Daniel W. McGovern follows:]

SUMMARY OF STATEMENT OF DANIEL W. MCGOVERN

Regarding the three aspects of H.R. 5227 which are of greatest interest to the Department of State, the Department

Supports the bill insofar as it provides that only the Attorney General has authority to initiate extradition proceedings;

Supports the bill insofar as it provides that the parties have a right of direct appeal from court orders granting or denying extradition; and

Urges the bill be changed to provide, as does S. 1940, that the Secretary of State has exclusive jurisdiction to determine whether the crime for which extradition is requested is a political offense or an offense of a political character.

STATEMENT OF DANIEL W. MCGOVERN

Mr. Chairman and Members of the Committee, I appreciate this opportunity to appear before you to express the Department of State's position on H.R. 5227—the proposed "Extradition Act of 1981." In my prepared testimony today I will confine my comments to the three questions that are of greatest interest to the Department. First, who should have the authority to initiate an extradition proceeding? Second, what right of review should the parties have? Third, who should decide the question whether a foreign state is seeking extradition for a political offense or an offense of a political character or for the purpose of punishing a person for his political opinions?

I will first address section 3192, which specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government. The present statutory scheme does not specify who may file complaints in extradition matters. The rule developed by the courts appears to be that anyone acting under the authority of the demanding government may file a complaint for extradition. Thus, extradition cases have been instituted by diplomatic or consular representatives, foreign police officers, and even private citizens who claim to be acting on behalf of a foreign government. This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government. However, in recent years, the Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition, or pursuant to an informal international agreement for reciprocal legal representation.

Section 3192 completes and codifies this desirable trend in the law by permitting only the Attorney General to file an extradition complaint. This restriction reflects the fact that the decision to initiate extradition proceedings, like other criminal proceedings in the federal courts, properly lies within the prosecutorial discretion of the chief federal law enforcement official, the Attorney General. The restriction will free the courts from any need to determine whether a private person is "authorized" to act on behalf of a foreign government to institute extradition proceedings. It will also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harassment, debt collection, or other improper purposes.

I will turn now very briefly to section 3195. Under present law there is no direct appeal from a judicial officer's finding in an extradition proceeding. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense and complication to a process which should be simple and expeditious. Section 3195 rem-

edies this defect in current procedure by permitting either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision.

Finally, I will discuss the question whether the courts or the Secretary of State should determine whether a foreign state is seeking extradition for a political offense or an offense of a political character or for the purpose of punishing a person for his political opinions.

Under present case law the responsibility for making this determination is divided between the Judicial and Executive branches. The courts decide whether the crime for which extradition is requested is a political offense or an offense of a political character, but they traditionally defer to the Secretary of State the question whether the requesting country's motives in seeking extradition are political. Since these issues are usually intertwined, the result under current case law has been that the applicability of the political offense exception is decided by the courts in some cases and by the Executive branch in other, substantially similar, cases. The likelihood of inconsistent results is obvious.

H.R. 5227 essentially codifies the case law. Section 3194(e)(1) provides that the Secretary of State shall determine any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting him for his political opinions, race, religion, or nationality or whether extradition would be incompatible with humanitarian considerations. Section 3194(e)(2) provides that the courts shall determine any issue as to whether the foreign state is seeking extradition of a person for a political offense. As you know, S. 1940 takes a different approach; it confers upon the Secretary of State exclusive jurisdiction to determine all aspects of the political offense issue. For the following reasons, the Department of State continues to support the approach taken in S. 1940.

First, the most modern United States extradition treaties specify that the Executive branch of the requested country shall decide the applicability of the political offense exception. Moreover, as previously stated, under present case law the courts generally defer to the Executive branch the question whether the foreign government's extradition request is politically motivated. Thus, the approach adopted in S. 1940 is not a radical departure from present law. It should be noted that the political offense decisions are made exclusively by the Executive branch of government in several foreign countries, including Canada and Mexico.

Second, the decision to shield a criminal from extradition on the ground that his offense was "political" is not the kind of issue which lends itself to resolutions through the judicial process. There are few truly objective criteria on which a comprehensive definition of the term "political offense" can be based, and a public court proceeding is not an appropriate or desirable forum for careful analysis of a foreign state's intentions or political system. Rather, a decision on the "political offense" exception is (as the name suggests) inescapably political in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the Executive branch to decide—much as the decision to offer political asylum is an executive decision.

Third, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat international terrorism. The present law exacerbates this situation, because frequently the United States Government, through the Departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the government must take this position publicly before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against extradition on other grounds. By contrast, the approach taken by S. 1940 permits a more informed decision on extradition to be made in a manner less likely to be offensive to the foreign government in the case.

As I have explained, the Department continues to believe the Secretary of State should be given exclusive jurisdiction over the political offense issue. However, if the Congress ultimately determines that the courts should retain their present jurisdiction in this area, then the discretion of the courts should be limited, much in the way that section 3194(e)(2)(B) would limit it, by providing that certain classes of offenses are not to be considered political offenses. If this is the approach ultimately adopted, the qualifier "normally" should be stricken from the stem of section 3194(e)(2)(B), leaving the resolution of the unusual case to the Secretary of State. Furthermore, this section should be amended to make clear, what I assume is intended, that the Secretary retains his present authority to reconsider the question if

the courts reject a fugitive's claim that his extradition is being sought for a political offense.

I would be pleased to respond to any questions the Committee may have.

Mr. HUGHES. Thank you, Mr. McGovern.

Mr. Olsen, under H.R. 5227, I would submit that neither *Mackin* or *Abu Eain* would have been decided as it was, because the legislation defines what is and what is not a political offense. And under the definition of what is not a political offense and the acts of violence, it would render it not a political offense by definition, is that not so?

Mr. OLSEN. I believe that *Abu Eain* would have been decided in that fashion, but not with *Mackin*.

Mr. HUGHES. Mr. McGovern.

Mr. MCGOVERN. Mr. Chairman, if I may address that question. I think that the effort that the drafters of H.R. 5227 have made to define what is a political offense is an admirable effort. I think that we should not consider——

Mr. HUGHES. We get an A for effort.

Mr. MCGOVERN. If I may go on to point out the one reservation I have with regard to that. The legislation provides that a political offense normally does not include offenses specified therein. I think we all know that any lawyer worth his salt who was representing a defendant who felt that his offense was a political offense would claim that although his offense was murder, for example, that it should not be one of those which is normally not considered to be a political offense, that there were extraordinary circumstances in his case that should take his offense out of ambit of this legislation. So that the issue would then have to be litigated, I should imagine, in almost every case in which that it is litigated now. And the possibility would remain that different courts would reach different results in essentially the same circumstances. So whereas I think you certainly do deserve an A for effort, that the legislation would not resolve this very troubling issue of what should be considered a political offense.

Mr. HUGHES. What you are saying then is that you do not feel that it was properly drawn, and we should be trying to make certain that the criteria set forth in the legislation does not permit that type of interpretation? As I understand it, what your testimony is, however, you feel that the Department of State should make the decision, period. And it is not precisely drawn. You have latched on to the word normally, which we can change. In fact we have too much flexibility that can be changed very easily during the hearing process. This legislation is just to invite testimony and comments and just to try to elicit from witnesses on all sides of the issue a vehicle in order to develop the very best legislation.

Mr. MCGOVERN. I appreciate that, Mr. Chairman.

Mr. HUGHES. The issue, as you well know, is what rule if any should a court apply in deciding what is a political offense. Traditionally the courts have in domestic cases had a very prominent role to play in protecting the rights of citizens in extradition cases. Without some mechanism such as a judicial review of each aspect of the extradition case, what protections do you afford civilians of other countries when in fact it is desirous to extradite them to

their country? Are you suggesting that they are entitled to no rights in this country?

Mr. McGOVERN. Mr. Chairman, I most certainly am not suggesting that they are not entitled to any rights. We do appreciate the fact that the legislation is in a posture now that is inviting comments, and it is in that spirit that we prepared our comments. And in my prepared statement I indicated that if it is the decision of the Congress that the approach taken in H.R. 5227 should be followed through, then we would recommend that the term normally should be deleted from the definition of a political offense, which would leave the decision on unusual cases to the discretion of the Secretary of State.

I would point out that under the Senate version of this bill every other issue which has traditionally been resolved by the courts—for example, whether or not the proof is sufficient to establish probable cause, whether the individual sought is in fact the individual before the court—all of these issues would continue to be addressed by the courts as they properly should be.

As one who spent the last 8 years of my life on the staff of an appellate court, I feel that there are some issues that do not lend themselves to judicial resolution, and one such issue is the question of whether or not there is a political uprising in another nation of a sufficient character to establish a political offense. I do not think that this is an issue that is justiciable, and therefore I believe that it should be confided to the Secretary of State, who is, I believe, the executive officer most qualified to address such an issue.

Mr. HUGHES. Mr. McGovern, historically it has been the Secretary of State that has decided the motive, whatever that be, of the requesting jurisdiction. This legislation, you recognize, does not change that, so the Secretary of State has to make the ultimate decision as to the motive for extradition. That is on a government-to-government basis. We reserved, however, in the legislation the right of the judicial system, we vested it with that ultimate right, to decide political offenses, what is a political offense, giving some criteria to the courts which we feel is important, because some of the decisions obviously raise some problems.

I think the *Mackin* decision is a prime example of the embarrassment that that caused to our Government in our relationship with Great Britain. Ultimately the State Department has the right to grant political asylum to that individual if in fact it is determined that that individual otherwise qualifies for asylum. So it seems to me that the regime that we have tried to structure is a fair one, a balanced one, one that would enable the Secretary of State to make essentially political decisions on a government-to-government basis and have the courts protect the rights of individuals that find themselves before the courts.

Mr. Olsen.

Mr. OLSEN. Mr. Chairman, the problem is not with the political offense motive of the Government issue, but with the definitional standard used by the courts in trying to determine whether something is or is not a political offense is that we somehow link up the individual act that the requested person is accused of with a general state of disruption and violence. There is a tendency as a result of that for the courts to be encouraged and literally to receive evi-

dence as if there is a greater state of violence in a country, then it is more likely that that individual committed a political offense. And if you can show that the individual committed an offense in a successful fashion, that is, perpetrated his act of violence against a representative of the government as opposed to an innocent bystander or a child, then that person is much more likely to be deemed to have committed a political offense.

It seems from the standpoint of where we ought to be going in our courts that is not, it seems to me, the type of issue that we ought to be litigating in open court to the world, showing that if the individual can come in and show that there has been a tremendous state of violence existing or conflict and there is no standard or threshold, and can show that he or she is a member of an organization that advocates the use of violence, and then that the individual act itself is a violent one, that that is going to be a basis for refusing extradition.

Together with that I point out one of the problems that happened in the *Abu Eain* case where Abu Eain denied that he was involved in the act at all. Defense said I did not do it, but the act itself is in the nature of a political offense. He did not say later that I did it and that was a political offense. He said that the act that has been charged against me is in the nature of a political act. So he is taking the court to a position where he is saying please adopt my construction of those alleged facts for which I deny culpability, construct them the way I ask you to, and have a hearing on the state of strife and conflict within that foreign country.

From the standpoint of whether this issue ought to be left with the courts or the State Department, I would not want the United States, it seems to me, to go on record as encouraging this type of an issue in our courts. It does not—the perception that other countries would have when—if this bill gets enacted with the Attorney General being the party, we then are a party to a proceeding where we are litigating the quantum or the quality of violence that exists in other countries. If the individual comes in and shows that there may be violence, but more importantly he was an active participant in it, he is rewarded.

In *Abu Eain* the case was easier because the victims were two children that were killed. But that is a direction of that type of a definition. And by striking out the words normally from H.R. 5227, I happen to share Mr. McGovern's view that a competent defense counsel would find a way to get around that to get into the definitional part of it.

Mr. HUGHES. Well, our job is to see that that does not happen, and a good lawyer's job is to try to see that it does happen. Lawyers are forever saying we did not do it, but if we did, here are the reasons why you should convict or otherwise.

Mr. OLSEN. But the difference is that we are not deciding the guilt or innocence.

Mr. HUGHES. I understand.

Mr. Sawyer.

Mr. SAWYER. As a practical matter, how many U.S. citizens are extradited to foreign countries? Do you have any idea whether that is highly infrequent or frequent?

Mr. OLSEN. The vast majority of persons who are extradited to foreign countries are foreign nationals. However, a number of our newer treaties do permit the extradition of U.S. nationals, and indeed I would estimate probably about 10 to 20 percent of the persons extradited to foreign countries are U.S. nationals.

Mr. SAWYER. I am somewhat interested in the bail provision. In cases involving extradition from one State to another, they generally do not permit bail, at least to my knowledge. In other words, when a fugitive from Texas is arrested in Michigan, he is held without bail until the Texas authorities do whatever they have to do to get him to Texas. We do not release him on bail. I am not aware that any other States do. Do they?

Mr. ABBELL. I believe that is correct. I am not as familiar with the State laws in this regard. But certainly we have to keep in mind that the person by definition is a fugitive from a foreign country, and that he is absent from that country which is accusing him of a crime. I think it therefore is incumbent on him to show that there are special circumstances that warrant his release, something extraordinary, such as he is in such bad health that to incarcerate him would possibly lead to his death, or he is responsible for someone who is incapacitated, and to keep him in prison would cause some great harm to that person.

And also, of course, we have to keep in mind that the legislation both in S. 1940, the Senate bill, and in H.R. 5227, the House bill, would permit the Attorney General for the first time to proceed by route of summons if the Attorney General thinks that the person whose extradition is sought is not likely to be a flight risk. Most often that would be applied to situations involving requests for American citizens who have substantial ties to the community who did not flee from the foreign country, but simply were accused say of committing a fraud there, but they have always conducted their business in a particular location in the United States. This bill permits the Attorney General in such cases to make a decision that this person is not likely to flee, and therefore we are confident we will be able to deliver that person up if he is found extraditable.

Mr. OLSEN. Congressman, I am not sure that you should be led into believing that there is no basis for bail in the case of extradition. That is a situation where the individual could be, as in the case of a foreign extradition, could be an escapee from prison, having been convicted and having committed another offense by fleeing, or could be simply a never arrested and indicted defendant in a case, which at the time of his or her arrest in the other jurisdiction was never aware of the proceedings, and that therefore that the constitutional definition of entitlement to bail would be viewed differently.

There are, however, very different considerations, and it is in the case of foreign extraditions than in the case of the domestic extraditions. Probably one of the most important, the one we get with these acts of "terrorism," whether the individual has entered the country legally, lawfully, and whether he or she has come into the United States by some fraudulent means, false identification, false purpose, something to that extent. And that it seems to us is a threshold issue that we do look at, because if the individual is a noncitizen, is an alien, then we do otherwise lack jurisdiction.

Mr. SAWYER. Mr. McGovern, do you not think that a proper way of proceeding would be for the State Department to make its recommendations to the court as to the status of the political upheaval or whatever in the other country, and then let the judiciary decide whether or not there is a political offense? Would you feel more comfortable with the court making that decision?

Mr. MCGOVERN. I would not, Mr. Congressman. The current procedure is, as you know, for the courts to consider this issue, and in a number of recent cases, the *Abu Eain* extradition case and *Mackin* case the State Department did provide a witness who testified on the issue of the political offense exception. I would note parenthetically that this puts the Department of State in an awkward position, because on the one hand if the courts find, as they did in the *Abu Eain* case, that it was not a political offense, that issue must be decided de novo by the Secretary of State, so that he has on the one hand stated his position on the record in the trial court, and on the other hand is expected to reconsider that issue when it reaches him if the fugitive is found extraditable by the courts.

The State Department was subject to considerable criticism from those people who felt that *Abu Eain* was not justly treated by the courts because the State Department was in the position of on the one hand of having taken a position, and on the other hand of having to reconsider the matter.

The other disadvantage as I pointed out to the chairman is that I simply do not believe that all issues are justiciable issues. Not all issues lend themselves to judicial resolution. I think the classic example of whether or not something is a justiciable issue is a question of fact, did this individual commit this crime on a given date. The court can decide that. But is there a political upheaval in a foreign nation, that is not a question the court is competent to decide, I submit.

Mr. SAWYER. Under the present situation, if the court decides that this person is extraditable, and that there is no political offense, does the Secretary of State have the last word? Can the Secretary of State overrule that?

Mr. MCGOVERN. If the court finds that the political offense exception is not applicable and that the person is extraditable, the Secretary of State has the final word. If the court finds that the political offense exception is applicable and that the person is therefore not extraditable, the Secretary of State has no role to play, and it is that situation that provides the most discomfort to foreign nations who are seeking extradition. They find that extradition has been denied on the political offense ground by the courts, and the State Department has had no role to play in making that decision.

Mr. SAWYER. Wouldn't the State Department have had the right to be heard on that before the decision was made by the court?

Mr. MCGOVERN. That is correct. They have the right to present evidence on that.

Mr. SAWYER. Do you feel more comfortable with the State Department making the decision?

Mr. MCGOVERN. I do. I have negotiated such a provision in treaties approved, not treaties that I have personally negotiated, but treaties that have been approved by the Senate recently, Colombia and the Netherlands, ratified by the advice and consent given by

the Senate, and ratified by the President. Our most recent treaty with Mexico, which came into force in 1980, also confers to the exclusive jurisdiction of the Executive authority the political offense issue. I do feel comfortable with that.

Mr. SAWYER. I would like to acknowledge the assistance of Mr. Abbell when I was trying to get a prisoner transfer treaty a couple of years ago.

Thank you, Mr. Chairman. That is all I have.

Mr. HUGHES. Thank you.

Mr. Hall.

Mr. HALL. When you have an extradition proceeding, what are the factors you must prove before the court will assume jurisdiction?

Mr. MCGOVERN. We first review the papers to make sure that they are in proper form, that there is no clear evidence of any exception to the extradition or treaty, if it covers the situation, and then we forward those documents to the Department of Justice, which represents the foreign government in court on the matter.

Mr. HALL. Does the Department of Justice make the determination after you have reviewed the papers?

Mr. OLSEN. The Department of Justice will provide a review by its staff of lawyers in addition to the work done by the State Department. The basic process starts by looking at the extradition treaty, comparing that to the documentation we have received. The first or threshold issue is whether or not there has been with sufficient particularity evidence of a crime that fits within the extradition treaty. If there is evidence of the identity of the perpetrator linking that crime to the individual or individuals and that other legal technical requirements are met and satisfied—if there is something wrong with the documentation, we will get back with the State Department on a working relationship and get the matter corrected. Sometimes a foreign government may have not had sufficient evidence or may have left something out. We will get that corrected prior to the time we come into court.

Mr. HALL. During this period of time of course the alleged defendant has his freedom in the United States somewhere? Assuming that generally would be the fact situation.

Mr. OLSEN. Yes.

Mr. HALL. How long does it take from the time that you are notified about this extradition to the time that the State Department has it and it goes to the Attorney General and back and forth, how long a period of time does that take?

Mr. ABBELL. The situation could vary over a great range. There are two situations that can occur. The first is where the country knows where the person is located. They think he is not going to leave before the United States receives the documents, and so they provide us with a full set of documents. We take those documents, we screen them, we make sure they establish a probable-cause case and establish the identify of the person sought. We have the U.S. attorney in the relevant district file a complaint and obtain a warrant for arrest. We then are ready to proceed immediately with the extradition. Generally the person would be incarcerated upon the execution of the arrest warrant pending the hearing.

Another situation can occur when we have a fugitive who is likely to continue to flee and we expect that if he is aware that we are looking for him he will escape and either leave the country or leave where we know he is located. In that case, we proceed by provisional arrest. Provisional arrest, we have to have sufficient information from the foreign country to establish identity of the person sought and also sufficient information to show that they have information that he has been charged with a crime, and also that there is sufficient information to—a brief statement of facts that describes the probable cause that they will present in the documents which they will refer later. Then this person would be arrested, and they would have a specific period depending on the treaty, varying from generally 40 to 60 days under our treaties, to provide us with the documents that we would introduce in court. We would introduce them and then have the extradition hearing.

Mr. HALL. Up to this point the only thing that the Government has done is to try to see if there is a probable cause to arrest the defendant?

Mr. ABBELL. That is basically correct. We screen the documents, make sure they are proper.

Mr. HALL. Now at that point has the court assumed jurisdiction of this case?

Mr. ABBELL. The court does not assume jurisdiction until we go to the court with the complaint and ask the court to issue a warrant of arrest.

Mr. HALL. If it calls for the court to enter any orders, if you have some understanding that this defendant has knowledge that this proceeding is pending and may be leaving the United States to go to Mexico, does the court have any authority under present law or under the new bill that we are discussing, 5227, to immediately attach the person and hold that person in custody until other matters are determined?

Mr. ABBELL. That is generally what is done. It is rare that the person is released after the complaint is filed and he is arrested upon that complaint.

Mr. HALL. At what point in time, and I believe you stated earlier, one of you gentlemen did, that the court decides the bail, the amount of bail, and the burden is on the alleged defendant to produce evidence of special circumstances.

Mr. ABBELL. That is the present law.

Mr. HALL. Is that the law under proposed H.R. 5227?

Mr. ABBELL. It is not the proposal under H.R. 5227.

Mr. HALL. What is the difference?

Mr. ABBELL. Under H.R. 5227 a bail hearing would be conducted, but the burden would be on the Government to establish why this person must be incarcerated pending the extradition hearing, and given the nature of the situation, it is often difficult for us to get all of that information from the foreign country, and we believe that the present law, which places the burden on the person sought to present to the court the reasons why that person should be released, is the proper allocation of the burden of proof.

Mr. HALL. When is a determination made as to whether this is a political offense or something of a political character?

Mr. ABBELL. Under the present law——

Mr. HALL. As I understand it there is a distinction between those two.

Mr. ABBELL. Under the present law the court makes that decision as part of its finding of extraditability after taking evidence at the extradition hearing.

Mr. HALL. Would that be after the bond hearing or at the same time as the bond hearing?

Mr. ABBELL. Generally the bond hearing is prior to the extradition hearing on the merits of the request by the foreign country. And then the decision by the court, of course, is generally after it conducts the hearing.

Mr. HALL. Some of you mentioned earlier expert testimony is used. What constitutes expert testimony determining whether or not it is a bailable offense or special circumstances or whether or not it is in the nature of a political offense or of a political character? What is expert testimony in this instance?

Mr. OLSEN. Congressman, the expert testimony was not used in the sense for the bail proceeding, but only in the political-offense area.

Mr. HALL. All right. What is the difference between a political offense and an offense of a political character under the existing law or under the proposed 5227?

Mr. OLSEN. If I could answer that properly I would not be able to take the position I have. I will leave that for the State Department.

Mr. MCGOVERN. As Mr. Olsen's deferral may suggest, this is not a matter that is completely free from doubt. Traditionally one has two categories, pure political offenses and relative political offenses.

Mr. HALL. Give me an example of those.

Mr. MCGOVERN. Pure political offenses are crimes against the state rather than against individuals, and generally limited to treason, sedition, and espionage. The cases that we see in litigation and the cases that have newspaper attention in the past few years have been what we refer to as relative political offenses.

Mr. HALL. If the people who have kidnaped General Dozier took his life and came to the United States, would that be an offense of a political offense—let me rephrase that. Would that be a political offense or something of a political character?

Mr. MCGOVERN. I think that it can almost surely be predicted, Mr. Congressman, that they would claim that it was an offense of a political character in that it was motivated by political considerations.

Mr. HALL. If that be the case, that person would not be extraditable back to Italy, would be?

Mr. MCGOVERN. If he prevailed in the courts on that issue, Mr. Congressman, he would not be extraditable. I can almost guarantee you that he would assert that it was a political offense.

Mr. HALL. What is an example of an offense of a political character?

Mr. MCGOVERN. We have been discussing that: a common crime like murder or kidnaping that is said to be motivated by political considerations.

Mr. HALL. Well, is there not a very fine distinction between the two?

Mr. McGOVERN. The distinction that is given is the difference between an offense like treason, which is directed entirely against the state rather than an individual victim, and an offense like murder, where you have an individual victim. It is a very diaphanous distinction, and not one that I can claim to be at all comfortable with.

Mr. HALL. Does H.R. 5227 go far enough to clear up that minute difference to make it more palatable to someone trying to extradite back to that original country?

Mr. McGOVERN. It is the position of the State Department that H.R. 5227 takes a desirable step in indicating that offenses of the sort that you are hypothesizing, a politically motivated kidnaping, are not to be considered political offenses. But as I pointed out to the chairman, since the term normally is used, the kidnaper of for example General Dozier would say this is a kidnaping, but it is not a normal kidnaping. It should nevertheless be considered a political offense, and I think that he would definitely make the argument in the courts, and I cannot say whether or not he would prevail.

Mr. HALL. What is a normal kidnaping? You used that term. As distinguished from General Dozier's position?

Mr. McGOVERN. I must confess, Congressman, ignorance of what a normal kidnaping would be. It is not a term that I am espousing. It is a term that appears in the legislation.

Mr. HALL. In the 5227 legislation?

Mr. McGOVERN. Yes, sir.

Mr. HALL. Does that term normal kidnaping add to the confusion or eliminate some of the confusion as making a distinction between the two?

Mr. McGOVERN. 5227 says that certain offenses are not normally considered to be political offenses. I do not think that it significantly alleviates the confusion.

Mr. OLSEN. On a normal kidnaping, whatever that designation may be, by way of example, a kidnaping for ransom is one that has a connotation to it where the person is appropriated for the purpose of money or where the person is kidnaped for the purpose of completing commission of a crime, such as in the case of a robbery of a bank where they take the teller with them, or in the case of a stolen car, where they take the owner of the car with them. In the case of the example that you raised it does not appear that either one of those motives exists for the perpetration of that crime. Those crimes.

Mr. HALL. You mentioned earlier, either Mr. Olsen or Mr. McGovern, something about the manner in which a person would enter this country as having some significance on what type of an offense he may have committed or whether or not he or she might be entitled to bail. If a person entered this country we will say locally, but they had committed a crime in the foreign country that was of a political offense nature as distinguished from a political character, would that have anything to do with whether or not they might be granted bail in this country?

Mr. OLSEN. Would the question of whether they entered the country legally in the first place?

Mr. HALL. Yes.

Mr. OLSEN. I do not mean to beg the question, but it may be that the individual coming into the country stated an otherwise lawful reason for coming into the country, when in fact the reason was for purpose of flight, which is an evidence of consciousness of guilt of the offense itself. Assuming that the person came into the country otherwise ignorant of the offense itself that he was subsequently charged with, that would only indicate to the court one of many circumstances or factors that the court could look to in deciding whether or not this person was likely to flee from the extradition proceedings if he or she were released on bail.

Mr. HALL. In other words, that would be a mitigating circumstance if he came here not knowing he had committed a crime in the foreign country?

Mr. OLSEN. He says I did not know it but was not aware of it until these proceedings were instituted against me, and the evidence of my entry into the United States establishes a lawful purpose.

Mr. HALL. The judge would make the determination in these instances?

Mr. OLSEN. Yes.

Mr. HALL. But that the Department of State would make a determination as to whether it was a political offense or an offense of a political character?

Mr. OLSEN. That is correct.

Mr. MCGOVERN. Mr. Congressman, under the present law the courts initially consider the question of whether it is a political offense or an offense of a political character. If the courts determine that the claim that it is a political offense or an offense of a political character is valid and they find that the person is therefore not extraditable, that ends the matter. It goes no further. If the courts find that it is not a valid claim, that it is a political offense or an offense of a political character, then the Secretary of State has the discretion to reconsider that issue.

Mr. HALL. Does not the Government have the right to appeal those cases where the court might hold it is not an extraditable proceeding?

Mr. MCGOVERN. That is correct.

Mr. HALL. That they have not had in the past?

Mr. MCGOVERN. That is correct.

Mr. OLSEN. When the Government is in a sense the loser in an extradition proceeding, then that terminates our ability to challenge the wisdom of the law as applied by the court of the findings of fact.

Mr. HALL. I thought under 5227 that the Government would have the right to appeal if it lost on the State level.

Mr. OLSEN. That is right. It would change that.

Mr. HALL. How much of a problem do we have in what we have been talking about here today? Are we having any big problems today in our extradition proceedings of people from foreign countries back to those foreign countries? Is this something that needs to be fixed, or are we doing all right the way it is?

Mr. OLSEN. It is something that needs to be fixed.

Mr. HALL. What is the biggest area of improvement in 5227 over existing law?

Mr. OLSEN. Ninety-five percent of what is in 5227 represents case law as incorporated with some exceptions. Making the Attorney General the moving party on the extradition proceeding will simplify and expedite we believe that process, having the right to appeal. And of course that is a right for both sides. That will assure that to whatever extent that there is a hearing, either on probable cause and/or on the political offense issue, that that will be reviewed by other courts in full under common traditional standards of review by appellate courts.

The most serious problem, however, has to do with what has historically been a word of art in the definition of use of political offense from a time, when what we know today to be acts of terrorism are now bootstrapped up into what we believe are illegal claims of political action where we are using our courts as a public forum for cases in which the victims are innocent bystanders. They are civilians. They are not part of any particular government. They happened to be at the wrong place at the wrong time. Where individuals use that forum for the purpose we believe of espousing views which are by their nature very sensitive to the United States.

Mr. HALL. Let me ask one concluding question here. If it is a political offense, it is extraditable? If what occurred in the foreign country is proven by the evidence here or by determination of the Secretary of State that what happened was a political offense, it is——

Mr. OLSEN. Not extraditable.

Mr. HALL. Not extraditable if it is a political case?

Mr. OLSEN. Yes.

Mr. HALL. If it is of a political character it is extraditable?

Mr. OLSEN. Those are used interchangeably, borrowing in part from the different language in different treaties.

Mr. MCGOVERN. But neither would be extraditable.

Mr. HALL. What would be extraditable?

Mr. OLSEN. Narcotics-related offenses, fraud, not linked to a political act of a foreign government.

Mr. HALL. If a man killed two people overseas and came to the United States, is that an extraditable offense?

Mr. OLSEN. We would be charging him with bank robbery, perhaps murder. That individual could come into court and say that the reason for which I committed the robbery was to get money for a revolutionary purpose, which by its nature is a political act, and therefore what I committed was in the nature of a political offense.

Mr. HALL. Well, I did not say anything about a bank robbery. Suppose you had the Walter Williams case in reverse. That's what happened in France. A person who allegedly did that came to this country. Would that be an extraditable offense if the facts develop as we think they are developing today?

Mr. OLSEN. Yes.

Mr. HALL. So anything tinged with a political characteristic in any way would exclude a person from being extraditable?

Mr. OLSEN. No. It could depend on the way that the court used the nature of that claim.

Mr. MCGOVERN. It would permit a person to raise the issue.

Mr. OLSEN. You should not be led to believe that simply because someone makes the claim that therefore they are not extraditable. The problem is that there are in the very sensitive cases which are in the papers, that those are cases where the courts have a great deal of difficulty, in our view, in resolving the issue, and to the extent that we have inconsistent results, we have them in very glaring types of cases that stand out and raise the question of why do we have difficulty in extraditing people for otherwise acts of violence that they claim are political.

Mr. HALL. Well, now, I understand the Judicial Conference has not yet gone on record having an official position on this; is that correct?

Mr. OLSEN. I believe that is right.

Mr. HALL. What reason have they given for not taking an official position?

Mr. ABBELL. We are not aware of any specific reason. We do not know if they have had full opportunity to study it. First of all, this bill was only introduced in December, and although the Senate bill was originally introduced in 1980 and then reintroduced in 1981, we have had actually no contact by the Judicial Conference.

Mr. HALL. Presently the court makes a decision as to whether it is a political offense question under existing law?

Mr. OLSEN. Yes.

Mr. HALL. Under the new 5227, that determination will be given to the Secretary of State?

Mr. ABBELL. No. Under S. 1940 it would be given to the Secretary of State. Under 5227 it would be given to the courts under specific standards. H.R. 5227 says what is normally a political offense and then it says what is not normally a political offense.

Mr. HALL. That would still be under the jurisdiction of the courts?

Mr. ABBELL. Yes. There are two problems, as Mr. McGovern has said. The first problem is with what is—with the use of the word normally in the classification of what is not normally a political offense. If that word normally is removed, a lot of the problems attendant to H.R. 5227 in that respect are removed.

The other problem though is the classification of crimes that are considered normally to be political offenses, and that category has been mentioned, treason, sedition, espionage, these are traditionally considered to be pure political offenses. But that could cause us serious problems as well in that situations can arise.

Suppose that the British atomic spies, Burgess and Maclean, had been discovered when they were in the United States visiting, and England asked for their extradition, would our courts and our Government be telling England they could not obtain the extradition of these nuclear spies simply because their offense was espionage or treason?

Mr. HUGHES. Let me just say—I know that Mr. Conyers wants to be recognized—we can define what we think are political questions, just as we have endeavored to do in the bill, and I like to hear, and we will submit additional questions as to why we cannot first of all clearly define what we believe the court should take into account in hearing political questions and what they should not be taking into account as a political question. That to me is I think the issue.

I cannot believe that we cannot do a pretty good job, as we have endeavored to do initially in drafting the bill, as to what should be considered by the court as a political question.

Mr. ABBELL. I have to say that the job the committee has done is far better than the courts have done over the past 100 years.

Mr. HUGHES. Thank you. I know that another committee is waiting for your testimony. Does the gentleman from Texas have anything else?

Mr. HALL. No, I have no further questions.

Mr. HUGHES. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I was somewhat in a conflict as to whether or not to yield Mr. Hall any more time, although he started at about 10:30 at least before I got in, because he was asking some very important questions. I do not think I will need as much time as he has used.

But the point seems to turn on whether the State Department should go into the judging business, and I want to express my strong reluctance about any legislation that will give any more judicial determination to the State Department than they already have. I am sure you presented quite a few arguments about that already, so I will not try to go into them again.

Now, there is a consideration about bail that intrigues me. Why should bail standards be different from that of any other person that is brought before the Federal courts?

Mr. OLSEN. In our view, Congressman, there is a distinction between extradition proceedings involving requests by foreign countries. The circumstances themselves are inherently different. The sole basis for an extradition proceeding is predicated upon the existence of an extradition treaty, an agreement between two sovereigns that they will respect the requests of one country from another in the case of certain "fugitives." The cases we are talking about are criminal cases.

Mr. CONYERS. Well, is there proof of the guilt of the defendant at the time we set bail?

Mr. OLSEN. It may be, but in an extradition——

Mr. CONYERS. You say there may be?

Mr. OLSEN. Well, the requested person may have escaped from prison after having been convicted of a crime.

Mr. CONYERS. Does the presumption of innocence follow a noncitizen brought before the Federal court for a determination of bail in an extradition proceeding?

Mr. OLSEN. Yes, for the reason that the moving party, that is, the foreign country, through whichever vehicle it is, the Justice Department or their own representative, has the burden of coming forth and showing, satisfying the approximate cause requirements. If they do not do that, irrespective——

Mr. CONYERS. Then you are proposing that we change it, right?

Mr. OLSEN. That we change——

Mr. CONYERS. The presumption of innocence that accompanies even a noncitizen into the Federal court for purposes of citing bail.

Mr. OLSEN. No.

Mr. CONYERS. You presume to continue the presumption of innocence but to change the bail requirement?

Mr. OLSEN. The standards used by the courts today are on the basis of court doctrine cases that have evolved, so that if anyone is looking to why it is that a special-circumstance test is used by the courts today, it is not because the courts have been forced or required to take that position.

Mr. CONYERS. Then in other words, Mr. Olsen, you are proposing then that the Congress break its silence on this court-determined question under criminal law?

Mr. OLSEN. The standard that is used today is the one used by the courts, and what we are asking for is a continuation of what the courts have already been using in terms of a test or a standard. The criteria themselves as to what the court would use——

Mr. CONYERS. Just a moment, sir. What is the answer to my question?

Mr. OLSEN. I am sorry, Congressman.

Mr. CONYERS. The question is, are you proposing that we change the court-determined standard for setting bail?

Mr. OLSEN. No.

Mr. CONYERS. No; well, then, what are you proposing? Are you proposing any kind of a change in the bail requirements?

Mr. OLSEN. The bail provisions of H.R. 5227 are not consistent with the court standard that is used today for special circumstances. We are asking that this subcommittee adopt the standard that is used by the courts today, not change the standard. The difference would be, as you pointed out before, that the criteria, the factors that are going to be used by the court, basically looking to as much in the way of factual information as the court can, who has the burden of satisfying those requirements? Under the test that is used by the courts today, bail is not granted.

Mr. CONYERS. Are you saying you want to shift the burden of proof in a bail hearing?

Mr. OLSEN. No.

Mr. CONYERS. You do not want to do that. OK. What are the standards you suggest ought to be changed that would be enacted into law?

Mr. OLSEN. I am not asking——

Mr. CONYERS. You do not have any standards you want to change, either?

Mr. HUGHES. Would you yield?

Mr. CONYERS. Yes.

Mr. HUGHES. As I understand, Mr. Olsen testified that he would change the burden of going forward for the evidence.

Mr. CONYERS. You would change the burden of going forward, not the burden of proof; is that correct?

Mr. OLSEN. To the extent that that is a change with H.R. 5227.

Mr. CONYERS. Is what the chairman said correct or incorrect?

Mr. OLSEN. It is correct.

Mr. CONYERS. OK. Thank you. I do not have any further questions.

Mr. HUGHES. I just have a couple of real short ones.

Most of the jurisdictions have the courts decide political questions, do they not?

Mr. OLSEN. Yes.

Mr. HUGHES. With regard to the question of bail, I think that you misinterpreted what the legislation does. The legislation leaves it up to the court in equal parts as to whether bail should be set, and we tried to furnish some criteria that the court should consider in setting bail. There are factors that should be considered that are not being considered such as jurisdiction, whether the individual was an illegal alien in the country, whether violence is involved, and a host of other things which this type of offense entails.

My question is, what is wrong with that approach? What is wrong with saying to the parties, you show the court why the individual should either be held or released on bail. The courts can make the decision. And there is no requirement that the Justice Department go forward with the burden of going forward. I think you have misread the legislation from that standpoint.

Mr. OLSEN. Well, in a bail proceeding, the first issue that comes before the court is looking at the charges, what is or is not the offense, and the court would then say, all right, on the question of setting bail, can I set bail right now? And before anything else occurs, you are going to get two different positions. The requested person or his lawyer would say you must set bail now unless the Government can show facts and circumstances denying that. The Government lawyer would stand up in court and say just the opposite.

Mr. HUGHES. I understand that, but that is the adversary process that is used. My point is that—all the legislation does is say in essence that the parties, you furnish evidence both for setting bail and against setting bail, and the courts can make the decision, and there is no presumption. What could be any fairer than that?

Mr. ABBELL. One thing that the bill does do is apply the presumption of release of the Bail Reform Act. Although it modifies the standards greatly. Instead of having——

Mr. HUGHES. I disagree.

Mr. ABBELL. Instead of imposing conditions that will reasonably insure the appearance. That is an improvement. It has factors such as safety of the community, the treaty obligations, the fact of the person's status in this country. All of those are taken into consideration, all of which are big improvements in H.R. 5227.

Mr. HUGHES. Not only big improvements, but it eliminates the presumption inherent in the Bail Reform Act.

Mr. ABBELL. We do not read it that way.

Mr. HUGHES. Then you have misread the legislation.

Moving on to the primary issue, I must say that there are arguments on both sides, and there are issues that are very serious ones that we want to take as much testimony as we can and make the right decision to balance that. But I do not understand how the State Department could make a determination as to what is a political offense without any hearing. Are you suggesting you would not have a hearing? And if, in fact, you are going to have a hearing, that is the province of the court, and you have already said that the standards that have been utilized are fairly decent standards, and if they can be improved, let us hear how we can improve them. If the standards are good enough for the State Department, why will they not be good enough for the court?

Mr. McGOVERN. Mr. Chairman, S. 1940, which the State Department does support, does not contemplate a hearing in the sense of a judicial hearing or anything akin to it.

Mr. HUGHES. Are you saying that you would not have a hearing on that issue? You would deny a hearing to an individual on that issue? State would not have a hearing?

Mr. McGOVERN. Not in the sense that witnesses would be presented or that live testimony would be taken, but instead that the person would have an opportunity to present his arguments on this issue in written form, affidavits; any testimony that he would seek to introduce by means of live witnesses in a court proceeding he could introduce by means of affidavits.

Mr. HUGHES. Mr. Olsen, do you think you can constitutionally deny an individual a right to a hearing on that issue?

Mr. OLSEN. The courts have addressed the question.

Mr. HUGHES. What do the circuit courts say?

Mr. OLSEN. That there is no constitutional right to a hearing either on the question of a political offense or on the question of extradition. I realize that from a perception standpoint that that may not be the answer that you wanted, but I think that we are not talking about denying anyone the right to a hearing, because we are still talking about preserving and protecting forever all of the requirements having to do with establishing proximate cause—probable cause, rather.

Mr. HUGHES. Why can the court not receive testimony on the issue of the political question as my colleague from Texas said? It has been done in other cases, including the *Abu Eain* case, by State on the issue of the political facts of life in that country. Why is that not the best process? The court is going to have to resolve all the other issues. It will have to resolve the issue of probable cause; it has got to resolve the ultimate issue of extraditability. Why should the court not be the one that makes the decision insofar as the political question with very narrowly defined criteria as to what constitutes a political offense?

Mr. McGOVERN. If I may return to the theme that I have sounded a number of times throughout this hearing, there are some issues that are not justiciable, that do not lend themselves to judicial resolution, and I do not think that it is an efficient or an effective way to mete out justice to have magistrates in various parts of this Nation constantly investigating the question whether or not there is an uprising in Northern Ireland. I think that instead the Secretary of State, who has the definitive information on this political issue——

Mr. HUGHES. Would you present that testimony to the court?

Mr. McGOVERN. The State Department would present the testimony to the court.

Mr. HUGHES. You are saying that the court is not in a position to take judicial notice. What about expert testimony on the issue? I cannot believe that some court is not going to give very serious weight to the testimony of the State Department on that issue.

Mr. McGOVERN. They can take testimony on it, Congressman. My point is that there are certain issues that courts are not competent to decide, even if they receive a great deal of testimony on.

Mr. HUGHES. I understand your testimony. Does the gentleman from Michigan have any further questions?

Mr. SAWYER. I might say that the court is compelled to decide every complex issue under the Sun given expert testimony. Judges are not experts in medicine, atomic science, aeronautics or many other highly complex areas, yet they still are required to decide questions in those areas with the aid of expert testimony. I see nothing more complex about questions of political stability or instability than many of these other things, and I do not know why you could not proceed in the same way. I would feel more comfortable with the courts making the decision than I would with the State Department.

That is all I have, Mr. Chairman.

Mr. HUGHES. Mr. Hall.

Mr. HALL. No questions.

Mr. HUGHES. Thank you very much. We have additional questions. We would like to hold the record open, without objection, and submit the questions for response for the record. Thank you very much.

Mr. HALL [presiding]. Our next witness is Mr. David Carliner. He is an attorney in the private practice of law here in the District of Columbia. His legal experience includes representation of many persons who face problems of immigration and naturalization. Mr. Carliner's specialization in matters related to international law has enabled him to be involved in a large number of groundbreaking legal developments in his field.

Mr. Carliner is testifying today on his own behalf. I should note that he is also a member of the International Human Rights Law Group, and is representing them in his testimony also.

We have received a copy of your statement, and without objection, it will be made a part of the record. Please proceed as you see fit.

TESTIMONY OF DAVID CARLINER, ATTORNEY, DISTRICT OF COLUMBIA, ON BEHALF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

Mr. CARLINER. I appreciate the opportunity to be here and to give testimony both individually and as a chairman of the International Human Rights Law Group. Let me say by way of describing the International Human Rights Law Group, that we are a group of lawyers, professors, and other persons who have been carrying on activities in the field of international human rights law since 1978. Our organization has appeared in virtually every tribunal concerned with the issue of human rights both in courts as well as United Nations agencies and in the Inter-American Human Rights Commission.

We are concerned about the provision with regard to extradition. I deeply regret that the witnesses from the State Department and the Department of Justice were not able to remain to hear the remainder of the testimony, because I am going to comment in large part upon the testimony they have given.

I must say that I am somewhat incredulous at the testimony of the Assistant Attorney General and the Deputy Legal Adviser of

the State Department. Their testimony could not have been reviewed by the Office of Management and Budget, which I understand reviews testimony of Government officials, because one fork of the tongue here is not knowing what the other fork of the tongue is saying.

It happens at this moment before this very committee the administration, which includes the State Department and the Department of Justice, is proposing on issues that are virtually identical to some of the issues here; namely, who shall be able to apply for asylum in the United States, that the Immigration and Naturalization Service of the Department of Justice, appoint a person known as an asylum officer to make determinations with regard to who will be subject to persecution in a foreign country because of political reasons, membership in social groups, race, or religious groups.

I am even more incredulous that the Deputy Assistant Attorney General has said that neither the Department of Justice nor the courts have the competence to make these decisions. The Department of Justice has been making these decisions at least since 1952, and the courts have been making them even earlier.

The issue has arisen under section 243(h) of the Immigration and Nationality Act which permits a person in deportation proceedings to apply for a stay of deportation on the ground that he would be subject to persecution in the country to which he is being deported upon the ground of political activities and religious and other factors. In point of fact, the Immigration Service through officials known as immigration judges has been making justiciable decisions on this particular question. Those decisions have been reviewed by an administrative board within the Department of Justice known as the Board of Immigration Appeals, making similar justiciable decisions on these questions. In many instances these decisions have been reviewed by courts of appeals in the United States reviewing these issues on the basis of the administrative record.

I would like to call to the committee's attention articles that have been written on this question which review what is a rather sorry record, a sorry record with regard to the administrative decisions. One article is written by a late professor of political science at Wellesley College, the former president of the American Society of International Law, Dr. Alona Evans. She has written several articles. One "Political Refugees, U.S. Immigration Laws," and an earlier article published in the International Lawyer, issued by the American Bar Association, "Political Refugees in the United States, Immigration Law and Practice." Another article was written by a commentator for the Washington University Law Quarterly in 1976, "Judicial Review of Administrative Stays of Deportation." In addition, Dr. Evans wrote a very excellent article which appeared in the American Journal of International Law in January 1963, "Reflections upon the Political Offenses of International Practice."

If I were to be asked which agency should make the decisions as to what is a political offense, the court or the State Department, I would have to say that the State Department is less qualified than the courts of the United States. A review of the behavior of the State Department—I say this in a nonpartisan sense—over the years, in determining political questions, has been abysmal. One

can recall, for example, immediately prior to World War II, the conference to determine whether any steps should be taken by the U.S. Government to allow German Jews to come to the United States, the negative position taken by the U.S. Government at that time, the return of boats from the United States which were sent back to Germany, with Jews who were seeking to be free from persecution there.

This is a historical episode, an indecent page in American history. I wish I could say that it has ended. I cannot. It has continued up to December 18, 1981. Under present law, the State Department has a role to play in rendering advisory opinions to the Immigration Service in determining whether persons are subject to political, religious, racial, or other kinds of persecution. Until May 1981, the State Department had been holding in abeyance for almost 2 years applications for asylum by persons from Iran. The decisions were held in abeyance for a period of time, for understandable reasons, but for political reasons.

After the fall of the Shah's government and the emergence of Khomeini as the ruler of Iran, requests for asylum in the United States were filed by many persons in the Iranian Government who would have been executed because they were members of the Shah's government. The State Department held up those applications because it was waiting for the situation to be clarified. The true reason was that, initially, the United States was attempting to cement its relationship with Iran. Subsequently, it was to await the release of the hostages, since it did not want to take steps that would jeopardize their lives. The decision was delayed when the hostages were seized, certainly for understandable reasons.

In May 1981, the State Department began to render decisions on these questions. From May to September, it decided a number of cases. On September 4, it reached a large number of cases involving Iranian Jews, Armenian Christians, and other groups. Almost universally it turned down those cases. In the decisions rendered on September 4, the State Department, through the Bureau of Human Rights and Humanitarian Affairs, said that the Constitution of Iran provides religious freedom for all persons in Iran, with the exception of Baha'is. Anyone who is a Jew could not be granted asylum, except for those who had difficulties because of claims they had engaged in activities on behalf of Israel and were Zionists. These Jews would have the right to show an individualized basis for a claim that they would be subject to persecution.

The test in the statute is whether a person has a reasonable fear that the person, himself, would be subject to persecution in a foreign country for various reasons. It happens that one of the first executions by the Khomeini government was of a leading Jew who was a Zionist in Iran, stating that he was an espionage agent for the Israeli Government and that his offense included raising money to send to Israel. His execution sent a chill of horror throughout the entire Jewish community in Iran. Since that time, an additional 9 or 10 Jews have been executed for trumped-up charges.

The fact of the matter is that the treatment of the Jews in most of the Arab and Muslim countries, since the emergence of Israel as a state, has been such that the Jews for the most part have fled

those countries. Those Jews who have remained behind, whatever their reasons, have been at risk. The evidence from every organization concerned with the issue indicates that a Jew in Iran today has a reasonable fear of persecution because, even though he may have the right to go to the synagogue, because he is a Jew he is suspected of being a Zionist.

Khomeini has made statements defending the rights of Jews to practice their religion, but his grandson, who is close to him, has been an active supporter of the PLO in Iran, and street mobs have molested and bothered Jews without any police protection. Thus, we see the State Department, in a highly sensitive area, taking a negative attitude on this particular issue, even today, I must say, for political reasons.

The treatment has extended, also, to the Armenian Christians. The Armenians fled to Iran after the Turks massacred so many of them. They see the same kind of person in Iran who threatens their existence because of devotion to Islam. Fortunately, the Secretary of State for Human Rights and Humanitarian Affairs has now announced that the decision of the State Department will be changed.

I give this at some length because it shows that the role of the State Department is a political one. If one looks at the job description for the Secretary of State as distinguished from the job description for a judge, obviously the Secretary of State has, as his primary role, a role to play in promoting our foreign relations and conducting our foreign policy. If one examines the role of the State Department in asserting the human rights interest which has emerged as a relatively recent concern of the State Department, one must see that in almost every instance, human rights concern has been subordinated to a larger political concern.

It is impossible for the State Department to be given sole discretion in this matter. Given the responsibilities of the State Department in conducting foreign affairs, it will inevitably look to the interests of the United States in our international relations rather than to individual rights of the person whose extradition is being sought.

I could give other illustrations of the egregious conduct of the State Department in handling these matters. I will give two, if I may. When Sukarno was overthrown in Indonesia, one of the unhappy consequences in the years following was that 300,000 Chinese were murdered, massacred by Indonesians. It was not a well-publicized event in the American press, but it is a fact of history. During this period, the Indonesian desk at the State Department did not believe that the Chinese could claim racial asylum in the United States. It downplayed the episode. I do not have any evidence for it, but quite obviously, the U.S. Government was attempting to establish a friendly relationship with the Indonesian Government, and the treatment of the Chinese was a secondary consideration for us.

I had a case a number of years ago of a white, Episcopalian theologian from South Africa who came to the United States for graduate study. He was a vigorous opponent of apartheid and after he completed his course of studies, he decided it was not safe for him to go back to South Africa.

The deputy commissioner of the Immigration and Naturalization Service told me that this man could remain in the United States as long as he wanted to, but that the U.S. Government would not find that he would be subject to political persecution in South Africa because of his opposition to apartheid.

What we have here today is the spectacle of officials of the State Department and the Department of Justice citing two wrong decisions by the courts on the cases of the two people in the Irish Republican Army who had been held to have committed a political offense, and a near miss, they feel, in the *Abu Eain* case in Chicago, as justification for a change in the long-established role of the courts.

The history of the determination of this issue is not only in these three cases. The courts of every country in the world which has courts to decide these issues have been assigned the determination of this issue ever since the political offense clause was written into extradition treaties and laws.

It was introduced by Belgium in the 1830's as a result of political uprisings and activity then in Europe. The courts for 100 years, for the most part, have been defining the nature of a political offense—the courts of Argentina, Chile, Palestine, before it was Israel, and the courts of England, and Australia.

Almost always, these courts have held that people who commit murder as a political act are not immunized from extradition because the person they seek to murder has been an ambassador or a political figure.

The fact that two recent cases have created a problem for the Government is not a justification for eliminating the role of the court merely because the administration doesn't like the court's rulings in a particular case.

Mr. McGovern said that the issue is not justiciable. I don't know what he means. To me, it means that a human being who is a judge doesn't have the capacity to render the same kind of a decision that a human being serving as a legal officer in the State Department.

The State Department's role is to conduct foreign relations, but more than that, the people at the Department who act on these questions usually rely upon country desk officers as the source of information.

In my experience of more than 30 years with these desk officers, they tend to regard the country and its interests as their clients. They lack an impartial role in making decisions on this issue.

The chairman put a question earlier with regard to the right of a hearing. If there is a hearing on probable cause, if there is a hearing on the question of whether you have committed the crime, if there is a hearing on all the other issues as to which a hearing is provided, then least of all should the U.S. Government deprive a hearing on what is a political offense.

The nature of political liberty is the essence of our history as a country. To have this issue decided in the confines of an office of the State Department without having an open hearing in a court, as if to say that there is something wrong about an open hearing, and that there is something about the role of a human being who

has been appointed to be a judge which renders him incompetent to make this decision, is just not proper.

There is no reason why this decision should not be made by a court in an open session. The only arguments are that the U.S. Government would be embarrassed in its relation with a foreign country if decisions were made publicly, or as in the case of Abu Eain, that to allow a terrorist not to be extradited would encourage violence in those countries.

It is hard to believe that preventing a criminal to go back to Israel would create violence there. Even so, we have a role to play in defending the integrity of our own processes, more than we have to play on whether one or more individuals may or may not go back to a country.

The question of what is a political offense has been decided in numerous cases over the last 30 or 40 years, and the courts have not generally surrendered to false considerations and not generally prevented extradition of persons who make false claims for political asylum.

I would like to address myself to several specific provisions in the statute which I would like to suggest changes in for the reasons that I have given here.

Section (e)(1)(a), in which the——

Mr. HUGHES. What page?

Mr. CARLINER. On page 9, Mr. Chairman.

> Any issue as to whether the foreign State is seeking extradition of the person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State at the discretion of the Secretary of State.

That very issue is now being determined in asylum cases by officials within the Immigration and Naturalization Service. Persons coming to the United States from the Soviet Union, such as ballerinas who receive instant asylum or persons from Haiti, who are generally denied asylum, or whatever country, these persons apply for asylum before a subordinate of a district director of the Immigration and Naturalization Service.

That officer, who is not particularly qualified in foreign affairs, makes decisions based largely upon the advisory opinions rendered by the State Department.

If that officer rejects the application, the applicant can renew the application before an immigration judge in immigration proceedings who conducts a due process hearing.

That judge at an open hearing renders a decision. That decision is subject to review to the Board of Immigration Appeals. If the applicant doesn't care for that decision, he has the right of review in the U.S. Circuit Court of Appeals, or a right of review in a habeas corpus proceeding before a U.S. district court.

If the statute is enacted as proposed in the present language, there would be a conflict between the procedures for asylum and those involving extradition.

The courts have found the issues in these hearings to be justiciable. The hearing is not a de novo hearing. The hearing is one in which the court renders a decision based on the administrative record. It is an open hearing with an open record.

If there are facts to be held secret, then those facts cannot be used to weigh one way or the other in the decision.

So I would urge, Mr. Chairman, that the definition grant of a political offense in extradition proceedings continue to be tested in a court.

Now, the question of defining these issues is truly a difficult one, but the standards cited by the witnesses from the State Department and the Department of Justice do not appear to be correct.

They have testified that the issue arises only where violence and a state of war exists between the parties. But political actions often arise when there is no state of war.

One can look at the behavior of Mahatma Ghandi in India. He didn't care to have people pay salt taxes to Great Britain. He promoted civil obedience for political reasons.

Mr. HUGHES. Are you suggesting that we change existing law, which in essence has the Secretary of State reviewing the motives of a sovereign in securing extradition, because historically and traditionally, that has been the province of the Secretary of State?

Or are you suggesting that the Secretary's decision should be appealable? What are you saying?

Mr. CARLINER. My understanding of the existing law is that a court can look at the issue in the first instance.

Mr. HUGHES. No. The law is that the Secretary of State makes a decision and that is not appealable.

Mr. CARLINER. If that is the state of law, I apologize for my lack of knowledge about this issue.

Mr. HUGHES. I believe that is the state of the law.

Mr. CARLINER. If that is the standard, then I believe that it should be an issue which should be reviewed in a court. I don't think there is anything particularly unique in the Secretary of State for him to make this kind of decision. These decisions are being made now all the time by the administrative officers within the Department of Justice and are subject to judicial review.

They do not involve sensitive information, for the most part. Almost always the information is public. If not public, I suppose there are procedures available to have the information taken in camera if it may create a problem in relationships between our two countries.

But I do not see why there should be a distinction as to whether to extradite a person to the United States if he is being extradited for political reasons as distinguished from extraditing him because he has committed a definable political offense.

Mr. HUGHES. I understand.

Mr. CARLINER. In the notorious case, involving the Reichstag fire, the people charged with arson weren't in the United States, but history has established the Reichstag fire was committed by Nazis although Hitler charged others with the crime.

If the accused persons were in the United States, should they have been returned to Germany and prosecuted for arson? If so, should the decision have been made by the State Department? As you have stated, a judge can make this decision just as well, if not better than, the State Department.

Similarly, on the second issue, although it may be more difficult, is a question of whether the extradition is incompatible with humanitarian considerations.

Courts grant suspended sentences, parole, probation, and pass on parole determinations based on humanitarian considerations. So it seems to me there is no particular reason to vest this question also exclusively in the State Department.

Since the primary function of the Secretary of State is to promote the foreign relations of our country, humanitarian considerations may be perceived to be what is in the best interest of foreign policy.

The court may be more neutral. It is the price we pay to support humanity, even though against what we perceive to be our foreign policy.

With regard to the definition of political offense, I do not see the difficulties that the other witnesses have seen. The courts have defined what is political in specific situations, even more slippery words the courts interpret every day.

The phrase "of good moral character," for example, is one which courts have dealt with in determining who is eligible for citizenship in the United States, and who is eligible to be a member of the bar. What is moral in one community is not in another, what is moral today may not have been yesterday.

Another term is "crime involving moral turpitude." The Supreme Court in *Jordan* v. *de George* was confronted with the argument that it is too vague for deporting an alien from the United States.

It would seem somewhat easier to define a "political offense" because it has a certain standard of reference, since it involves activities relating to governmental matters.

This seems an easier issue to define than the other two terms. As Mr. Sawyer indicates, the courts pass every day, all the time, on complex issues, issues far more complex than whether there is a civil war going on in El Salvador.

So I would think that the term political offense is a justiciable question that is subject to determination by the courts.

Mr. Justice Brennan wrote a leading opinion discussing the question of reviewability of political matters. The fact that a decision may be "political," the Department of Justice and the State Department have often urged, makes it unreviewable by a court.

But it is clear from a line of decisions flowing from *Baker* v. *Carr* that the courts are competent to render decisions on political matters where issues are discrete.

It is discrete as to whether an act is such that renders a person immune from extradition because of political overtones. The provisions in the bill, set forth in (i), (ii), and (iii) set forth obviously political offenses.

I assume that the language is not intended to be all inclusive because of the discussion relating to what other offenses should not be included.

In (iii), "Unlawful political advocacy, but only if the advocacy is not to engage imminently in violence under circumstances in

which it is likely that such advocacy will imminently incite such violence."

I find an inconsistency between that phrase and the one which calls sedition a political offense. Sedition, if it means anything, is to urge some kind of activity, not always peaceful, to get rid of a government in power and to replace it with another kind of government.

It is usually a violent activity. I would think that qualification of (iii), although it renders hard decisions for courts, is better left out than put in. There are other kinds of political offenses not mentioned here.

Violations of espionage laws. The fact that a spy in England—gives secrets to the Soviet Union—could not be a basis for extradition from the United States. It is axiomatic that espionage is a question of giving secrets belonging to one government to another not entitled to get them.

That is a political act. Although we don't care for espionage for a country we are not too friendly with. The United States doesn't enforce the espionage laws of other countries. There is no occasion for the United States to extradite a person for that kind of political offense committed against another government.

There are other offenses which create problems and a court should decide them. There are decisions regarding people who leave Eastern European countries that have laws forbidding people to leave without permission.

Czechoslovakia has such a law. Its citizens are subject to prosecution because of the narrow offense of leaving the country without getting permission from the government.

Originally the Board of Immigration appeals held that was not being persecuted for political reasons. Later, it held if someone was leaving Czechoslovakia for political reasons, because they didn't like the government, it is a political offense.

So I think that the definition of a political offense is best left to the courts on a case-by-case basis because it is impossible to write in a statute every kind of situation that would arise.

Although I could address many other issues here, I am going to submit a statement which will develop more fully and perhaps more succinctly some of the issues that I have raised. I request permission to file the additional material with the committee.

Mr. HUGHES. The record will be left open and you can do that.

Let me ask you a question on the subject of espionage. Suppose the United States and Great Britain decided they wanted to make that offense extraditable, how would you handle that?

Mr. CARLINER. It could be done in a statute, I believe because if espionage is regarded by the Congress of the U.S. Government as an offense that should be extraditable, that is a political decision.

Mr. HUGHES. Suppose the act of espionage was just a property crime, not directed at the government itself, but just an opportunity to make $50,000? Would you make——

Mr. CARLINER. I would not regard that as a political offense. I understand from the Wall Street Journal that there is espionage going on between various kinds of business in the United States who want to know another company's secrets.

If a foreign corporation is engaged in espionage involving an American corporation to gain information, I don't perceive that as a political act. It becomes complicated if the foreign business is in a country where all the business is owned by the government.

Take South Africa, where most of the businesses are owned by the government. Espionage would become a political act. I suppose that one might make a distinction between what used to be called in municipal corporations law, proprietary and governmental activities. It becomes muddled, because if you are manufacturing nuclear energy, which is related to national defense issues, then it could become political.

Mr. HUGHES. Aside from the three areas that you have singled out with some recommendations, I assume that you otherwise support the legislation?

Mr. CARLINER. Generally. There is one issue I have touched on in my draft testimony having to do with the procedures with regard to the arrest on the basis of probable cause.

As we know, it is standard doctrine in the United States that a person should not be arrested except on the basis of probable cause. As the statute is drafted, it permits a person to be arrested upon a warrant and held in custody for 60 days merely upon the filing of a complaint, of an action by the Attorney General, as I recall, which doesn't have in it a standard for probable cause.

We have proposed language which we amend the bill in order to limit the ability of a magistrate to issue a warrant of arrest only where probable cause has been established. I assume that is intended, and if it is not intended, I would think that most courts would write that into the statute.

Mr. HUGHES. The Constitution requires that——

Mr. CARLINER. And the Constitution requires it.

Mr. HUGHES. Probable cause.

Mr. CARLINER. I think it could be read into the statute, I believe, but is not explicitly stated.

Mr. HUGHES. So other than those particular areas that you have expressed concern about, overall you support the thrust——

Mr. CARLINER. Overall we support the thrust of the statute. There is a need for more uniform procedures. I think it is better to have a centralized person issuing it, but we are most concerned with the issue of political offense.

Mr. HUGHES. And particularly who decides that issue?

Mr. CARLINER. And particularly who decides it.

Mr. HUGHES. Mr. Carliner, thank you very much. You have been most helpful to the subcommittee. The record will remain open for you to submit such additional comments as you would like.

Thank you very much.

[The statement follows:]

STATEMENT OF DAVID CARLINER

I. The Determination as to whether the foreign state is seeking extradition of a person for a political offense should remain in the hands of the judiciary:

A. The judiciary is competent to render decisions on the political offense question: The competence of the judicial branch to render decisions on whether an individual is being extradited for a political offense is evidenced by similar justiciable decisions made in deportation proceedings. Under § 243(h) of the Immigration and Nationality Act of 1952, the Attorney General is authorized to withhold deportation of

any alien within the United States to any country in which his opinion the alien would be subject to persecution on account of race, religion, or political opinion. The Immigration and Naturalization Service, of the Department of Justice, through officers known as immigration judges, decides this issue through a due process hearing. The decision of the immigration judge is subject to review by an administrative board within the Department of Justice, known as the Board of Immigration Appeals. The Circuit Courts of Appeal, then have jurisdiction to review these decisions on the basis of the administrative record. The justiciable decisions rendered in each level of the deportation proceeding clearly indicate the competence of the judiciary to approach similar issues in extradition proceedings.

The objection that the term "political offense" is too difficult a concept for the courts to work with seems unfounded. Courts continually have to apply general concepts. The phrase, "of good moral character", for example, is one which courts have dealt with in determining who is eligible for citizenship in the United States and who is eligible to be a member of the bar. The continually changing definition of "good moral character" has not impeded the courts from applying it as a standard in a given case. In *Jordan* v. *de George*. 341 U.S. 223 (1951) the Supreme Court was confronted with the argument that another term, i.e., "crime involving moral turpitude", was too vague to support deporting an alien from the United States. The term, "political offense" appears even easier to define than the preceeding terms, given the standard of reference to activities relating to governmental matters.

Finally the political question doctrine does not require the courts to abstain from deciding the political offense question. In *Baker* v. *Carr*, 369 U.S. 186 (1962), Mr. Justice Brennan reviewed the common elements of cases raising a political question:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from mutifarious pronouncements by various departments on one question."

The political offense determination, is not marred by the absence of judicially manageable standards. Furthermore, the line of decisions flowing from *Baker* v. *Carr* indicate that courts are competent to render decisions on political matters where the issues are discrete. The determination as to whether the activity in question constitutes offense is certainly such a discrete decision.

B. The independence of the judicial branch makes it best suited to protect individual rights in extradition proceedings:

The role to date played by the State Department and the Immigration and Naturalization Service in asylum proceedings suggests that the protection afforded to individual liberties by these bodies has been less than adequate. In "The Political Refugee in United States Immigration Law and Practice," 3 International Lawyer 205 (1969) Dr. Alona Evans, an expert on immigration law, concluded that:

"Where deportation proceedings are instituted against a refugee who then seeks to have deportation withheld by invoking section 243(h), the prospects for relief are very limited". . . the conclusion cannot be avoided that the continued rigorous interpretation of Section 242(h) does not seem to be consonant with the objectives of Congress in modifying this section of the law in 1965 nor entirely compatible with the broadly humanitarian policies of the United States designed to alleviate the condition of political oppressed persons which have been followed since the second World War" *Id.* at 253.

Similarly, with respect to extradition proceedings, Dr. Evans concluded that there must be a provision for impartial adjudication of both the charges and defenses in order". . . to protect the interests of the fugitive as well as those of the state concerned . . ."Evans, "Reflections Upon the Political Offense in International Practice," 57 Am. J. Int' 1 L. 1, 23 (1965).

Numerous examples exist of the failure of the State Department to afford adequate protection to individual liberties in determining political questions. One can recall, immediately prior to World War II, the negative position taken by the U.S. government to determine whether to allow German Jews to come to the United States and the subsequent return to Germany of boats filled with Jews who sought freedom from Hitler's persecution.

The behavior of the State Department with respect to applications for asylum by persons from Iran also suggest that courts are better suited to decide the political offense question. Under present law, the State Department renders advisory opin-

ions to the Immigration Service in determining whether persons are subject to political, religious, or other kinds of persecution. The test in the statute is whether a person has a reasonable fear that he would be subject to persecution for these reasons.

Until May 1981, the State Department had been holding for almost two years applications for asylum by persons from Iran. Many persons who feared execution because they had been members of the Shah's government filed applications. The State Department held back on deciding these cases because it was attempting to solidify its relationship with Iran to secure the release of the hostages. The political pressure on the State Department to hold back on these applications suggests that the courts, independent from such pressures, are better suited to make such decisions. Starting in May 1981, the State Department began to render decisions on these questions. On September 4th, it turned down a large number of applications by Iranian Jews and Armenian Christians. Explaining its decision, the State Department, through the Bureau of Human Rights and Humanitarian Affairs, said that the Constitution of Iran provides religious freedom for all persons in Iran with the exception of Bahai'is. Anyone who is a Jew could not be granted asylum except for those who had difficulties because of claims they had engaged in activities on behalf of Israel and were Zionists. These Jews would have the right to show an individualized basis for a claim that they would be subject to persecution.

This abusive treatment has extend also to Armenian Christians. The Armenians, who fled to Iran after the Turks massacred so many of them, fear persecution because of the Iranian devotion to Islam which threatens their existence as a religious minority. Fortunately, the Assistant Secretary of State for Human Rights and Humanitarian Affairs has now announced that the decision of the State Department on the propriety of granting asylum to these groups will be changed.

The egregious conduct of the State Department is also exemplified by events following the overthrow of Sukarno in Indonesia. The Indonesians massacred 300,000 Chinese in the years subsequent to the overthrow. During this period, the Indonesian desk at the State Department did not believe that the Chinese could claim racial asylum in the United States and downplayed the entire episode. The obvious, but unsubstantiated basis, for the belief of the Indonesian desk was that the United States was attempting to establish a friendly relation with the Indonesian government and that the treatment of the Chinese was a secondary consideration.

Similarly, a number of years ago a white, Episcopalian theologian came to the United States from South Africa for graduate studies. He was a vigorous opponent of apartheid. After he completed his studies, he decided it was not safe for him to go back to South Africa. The deputy commissioner of the Immigration and Naturalization Service took the position that this man could remain in the U.S. as long as he wanted to, but that the U.S. Government would not find that he would be subject to political persecution in South Africa because of his opposition to apartheid. The failure of the State Department to recognize political persecution in this case again indicates the political factors involved in their decision making.

These events show that the role of the State Department is a political one. The job of the Secretary of State, as distinguished from that of a judge, is to play a primary role in promoting and conducting foreign policy. The political role mandated by the nature of the State Department makes it impossible for the State Department to be given sole discretion in extradition proceedings. Given its responsibility to conduct foreign affairs, the State Department will inevitably look to the interests of the United States in international relations rather than to individual rights of the persons whose extradition is being sought. The persons at the State Department who act on these questions, usually rely upon country desk officers as their source of information. These desk officers tend to regard the country as their client which makes their decisions biased. The independence of the judicial branch, makes it better suited to safeguard individual rights in extradition proceedings.

The right to a judicial determination of the political offense question is also guaranteed by the American Declaration of the Rights and Duties of Man. Article XVIII provides:

"Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that to his prejudice, violate any fundamental constitutional rights."

C. The unpopularity of two recent decisions in the long history of the courts in determining extradition cases does not justify removing the political offense determination from the judiciary:

The State Department and Department of Justice justify the change in the long established role of the courts in determining the political offense on the "wrong"

results of two recent cases. In the *Peter McMullen* case, no. 3-78-1094 M.T. (N.D.Cal., filed May 11, 1979), McMullen, a member of the Irish Republican army had been charged with the bombing of a British army installation in England. In the *Desmond Mackin* case, no. 80 Cr. Misc., (S.D.N.Y., filed Aug. 13, 1981), Mackin was charged with attempting to murder a British soldier dressed in civilian clothes. The courts in both these cases, to the dismay of the executive branch, denied extradition on the grounds that the offenses charged were "political offenses". In addition, the cases of *Abu Eain, Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981), is cited as a "near miss" Abu Eain was charged with the bombing of several children in an Israeli resort town. The court, however, was tenuously able to distinguish *Mackin* and *McMullen* and held the political offense exception inapplicable.

The history of the determination of this issue is not in these three cases. The courts of every country in which the courts decide the extradition question have been assigned the determination of the political offense question ever since its inclusion in extradition treaties and laws.

The political offense exception originated in Belgium and France in the 1930's. Liberal statesmen devised the exception as a means to protect revolutionaries like Kossuth, Massini, and Garibaldi from being subject to extradition to reactionary regimes. Since its inception, the courts for the most part have been defining the nature of the political offense—including the courts of Argentina, Chile, Palestine (before it was Israel), England, and Australia.

Moreover, in interpreting the political offense clause, these courts have almost always held that people who commit murder as a political act are not automatically immunized from extradition because the person they seek to murder has been an ambassador or political figure. The adoption of American courts of the "political motives in-an-uprising" test, *In re Ezetg*, 62 Fed.972 (N.D. Cal. 1894) requires the existence of an uprising before murder will be considered a political offense.

The important role of the courts in protecting individual liberties in extradition proceedings cannot be taken away simply because the government is uncomfortable with two decisions. Individual liberties should not be jeopardized because of expediency or potential embarrassment. The traditional stance of the court to protect individual liberties in spite of political pressure, in contrast with the tendency of the State Department to subordinate these concerns to political factors, mandates that these decisions remain in the judiciary's hands.

D. American concepts of liberty and due process require an open hearing before a court:

To require a hearing before a court on the political offense question is consistent with the provisions of the bill for a hearing on probable cause, and on whether the person committed the crime. Moreover, the importance of the political offense decision in extradition proceeding provides the least justification for the United States to deprive the individual of a hearing on this issue.

The nature of political liberty is the essence of our history as a country. To have this issue decided in the confines of an office in the State Department without having an open hearing in a court intimates that there is something wrong about an open hearing on this question or something incompetent about the role of the judge in these types of proceedings. This intimation clearly contradicts the traditional and respected role of the courts in protecting political liberties. No reason exists why the decision should be made by a court in an open session. The proposed closed door procedure is reminiscent of the Spanish Inquisition and star chamber courts in England which were scorned by the framers of the Constitution. The suggestion that the United States might be embarrassed in its foreign relations with a country if these decisions were made publicly is not adequate justification for imperiling an individual's rights. Similarly, the argument that a judicial decision not to allow a terrorist to be extradited would encourage violence in those countries is an inadequate justification. Little support exists for the proposition that preventing extradition encourages violence. Even so, the United States has a more important role in maintaining the integrity of its procedures.

E. The Determination of Political Motive for Extradition should be placed in the hands of the judiciary, or at a minimum, be subject to judicial review:

Under § 3194(e)(1)(A) of the proposed bill:

"Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State."

This very issue is currently being determined in asylum cases by officials within the Immigration and Naturalization Service. Persons coming to the United States, whether ballerinas from the Soviet Union who receive instant asylum or persons

from Haiti, who are generally denied asylum, all apply for asylum before a subordinate of a district director of the Immigration and Naturalization Service. That officer, who is not particularly qualified in foreign affairs, renders a decision largely based on advisory opinions from the State Department. If the officer rejects the application, the applicant can renew the application before an immigration judge in immigration proceedings. The immigration judge, through an open due process hearing, renders a decision. This decision is subject to review by the Board of Immigration Appeals. If the applicant doesn't care for that decision, he has the right of review in the U.S. Circuit Courts of Appeal or a right of review in a habeas corpus proceeding before a U.S. district court.

If the Statute is enacted as proposed, there would be an inexplicable and unjustifiable difference between the procedures for asylum and those involving extradition. To reconcile the provisions requires that the initial decision be made by the judiciary or if made by the Secretary of State, at least be subject to judicial review. To leave such a decision up to the unbridled discretion of the Secretary of State, again opens the door to the abuse suggested above.

F. The Determination of whether humanitarian considerations would be incompatible with extradition should be made by the judiciary or subject to judicial review:

Under § 3194(e)(1)(B) of the proposed bill:

"Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State."

The traditional approach of the American courts to questions of humanitarian considerations in extradition proceedings has been to follow the rule of non-inquiry. Mr. Justice Holmes expressed the rule in 1910:

"We are bound by the existence of an extradition treaty to assume that the trial will be fair," *Gluckman* v. *Henkel,* 221 U.S. 508 (1910).

The application of this rule, however, may be on the decline. In *Nicosia* v. *Wall,* 422 F. 2d 1005, 1006 (5th Cir. 1971), the court stated: "the United States intends to . . . deny extradition in those cases in which it is demonstrated that a fugitive's life or freedom would be threatened on account of his political opinion," Similary, in *In re Mylonas,* 187 F. Supp. 716 (N.D. Ala. 1960) the court denied extradition for embezzlement because the conviction in abstentia in Greece may have been unjustly influenced by hostile attitudes engendered by the recent civil war.

The competence of the courts to consider this question is evidenced by their ability to suspend sentences, parole, and probation based on humanitarian considerations. The danger of leaving this determination solely to the Secretary of State once again threatens an individual's liberty. These decisions should be made by the judiciary at the first instance, or at a minimum be subject to judicial review.

II. The definition of a political offense is best left to the courts to decide on a case-by-case basis:

The guidelines provided in § 3194(e)(1)(B)(2) of the proposed bill as to what constitutes a political offense are both under inclusive and over inclusive, thus indicating that the definition should be left to the courts to decide on a case-by-case basis.

Section 3194(e)(1)(B)(2)(A)(iii) defines as a political offense "unlawful political advocacy but only if the advocacy will imminently incite such violence." This definition is inconsistent with the inclusion of sedition as a political offense under § 3194(e)(1)(B)(2)(A)(i). Sedition, if it means anything, is to urge some kind of activity, not always peaceful, to get rid of a government in power and to replace it with another kind of government. That qualification of (iii), although it renders hard decisions for courts, is better left out than put in.

Left out from the proposed definitions of political offenses is espionage. Espionage is essentially a political act. Although the United States does not care for espionage on behalf of a country we are not too friendly with, it does not enforce the espionage laws of other countries. Thus, there is no occasion on which the United States would extradite an individual for espionage committed against another country.

Another situation left uncovered by the proposed definitions is illegal emigration from Eastern European countries. Under Czechoslovakian law, an individual is subject to prosecution for leaving the country without governmental permission. Originally, the Board of Immigration Appeals held that such prosecution was not persecution for political reasons. Later it held that if someone was leaving the country because they did not like the government, the prosecution was political. The impossibility of writing in every type of situation that might arise makes it necessary for the courts to be able to determine what constitutes a political offense on a case-by-case basis.

III. A determination of probable cause is required before the issuance of an arrest warrant:

The proposed procedure for issuing an arrest warrant requires the judge to issue a warrant simply upon the filing of the complaint by the Attorney General. This procedure, which is duplicated in the Senate version of the bill (§ 1639), infringes upon the fourth amendment rights of the arrestee by failing to provide for a determination of probable cause by a neutral and detached magistrate prior to the issuance of the warrant.

The fourth amendment, in relevant part, states that "That rights of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon *probable cause* . . ." (emphasis added). In order to secure this freedom from unreasonable searches, the Supreme Court has required that the determination of probable cause be made by a "neutral and detached magistrate" instead of by the officer seeking the warrant *Johnson* v. *United States*, 333 U.S. 10, 14. The Supreme Court recognized that valid determinations of probable cause would probably not be made by the officer seeking the warrant due to the "often competitive enterprise of ferreting out crime." *Id.* Thus, only by allowing the neutral and detached magistrate to draw the inference of probable cause from the complaint before him would the right guaranteed by the fourth amendment be secure.

By omitting the role of the judiciary in determining probable cause in extradition proceedings, the guarantees of the fourth amendment are once again jeopardized. The Executive branch in seeking extraditions, is subject to pressures similar to those of an ordinary officer engaged in ferreting out crime. Threats of economic retaliation, competition, or other threats to the harmonious conduct of foreign affairs may lie behind the decision of the State Department to initiate extradition proceedings. The potential impact of the current proposal should not be underestimated. While the protection afforded by the fourth amendment extends to aliens in the United States, U.S. citizens are also subject to extradition. Such extradition proceedings could be brought against U.S. citizens who have committed crimes abroad as well as those who have conspired in the United States to violate foreign laws. Furthermore, the procedure allows the arrestee to be held for up to sixty days upon no more than a statement of the essential factual allegations of the conduct constituting the alleged offense. These factors magnify the threat to civil liberties inherent in the present procedure.

In order to rectify the deficiency in the current procedure, the following amendment is proposed.

"§ 3192(d). If it appears from the complaint, or from the evidence or documents filed with the complaint, that there is probable cause to believe that an offense has been committed and that the person sought has committed it, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to such person to appear at an extradition hearing under this chapter."

This amendment essentially incorporates the procedure adopted in the Federal Rules of Criminal Procedure, deviating only to accommodate the different materials submitted with the complaint in extradition proceedings. Only by providing for a judicial determination of probable cause will the guarantees of the fourth amendment be secure, guarantees which are no less applicable in extradition proceedings than in ordinary criminal cases.

The proposed procedure for issuing an arrest warrant also violates the American Declaration of the Rights and Duties of Man. Article XXV(3), in relevant part, provides:

"Every individual who has been deprived of his liberty has the right to the legality of his detention ascertained without delay, by a court, and the rights to be tried without delay or, otherwise to be released. . ."

Mr. HUGHES. Our next witness is Prof. Richard Falk. Professor Falk is the Milbank professor of international law and practice at Princeton University and has had a long and distinguished career in the field of international law.

Professor Falk has written numerous articles, treatises, and books on international law.

Professor, we have received a copy of your written statement, and without objection, it will be made a part of the hearing record.

Please proceed as you see fit.

TESTIMONY OF RICHARD FALK, MILBANK PROFESSOR OF INTERNATIONAL LAW AND PRACTICE, PRINCETON UNIVERSITY

Mr. FALK. Thank you very much, Mr. Chairman. I must apologize for the fact that you don't have my written statement, but I will try to be as brief as possible.

Mr. HUGHES. I was very optimistic about that.

Mr. FALK. I am very grateful for this opportunity to present my views here today, and I do so not only in my capacity as someone who has long been interested in the international law of human rights in general, and recently published a book entitled "Human Rights in State Sovereignty," but also as someone affiliated with the National Committee To Oppose the United States-Philippines Extradition Treaty, which is presently pending.

Let me begin by putting this whole set of hearings on the proposed extradition legislation in a broader context. I would contend that H.R. 5227 is a great improvement over what the executive branch would like to do with this subject matter, and that it is clearly superior to the Senate version, but I still feel that it falls rather seriously short of the requirements needed to satisfy interests of constitutional due process and to offer the realistic protection of the rights of those who claim they are being accused of political offenses.

And I think that this can best be seen in the context of understanding that the whole notion of extradition treaties presupposes that one is dealing with foreign governments that administer the law in a generally fair and reasonable manner and that, indeed, extradition is inappropriate, in my judgment, altogether, in relation to a government that represses its nonviolent political opposition.

And in that context, one has to view with a certain alarm the negotiations of treaties such as the pending United States-Philippines extradition treaty, because here we have a situation where a foreign government has consistently manipulated its domestic law to create—to fabricate criminal charges against its political enemies, charges of involvement with terrorism. Since the showing of probable cause in our own courts is quite formalistic, it is nearly impossible to establish a claim of political offense exception under these circumstances. Furthermore the absence of an independent judiciary in an authoritarian political system such as exists in the Philippines makes it unreasonable to rely on the prospect than an accused political opponent will receive a fair trial.

In other words, it is inappropriate as a matter of constitutional and human rights policy to establish an extradition relationship with a government that can't be expected to uphold the right of the accused, as well as being inconsistent with our own values and traditions.

Now, I believe that in light of that inappropriateness, the courts and the Congress have to try to act in a manner that takes actual account of the basic rights of those who are accused of crime by a foreign government against whom they are acting as a participant in an opposition movement.

The recent *Abu Eain* case, which has been invoked for many purposes, seems to me to suggest that even in relation to a government

with a certain degree of strong constitutional tradition, that of Israel, the basic problems of the sort I have in mind can arise.

In that case, the evidence of probable cause rested, in my judgment, on a dubious foundation, and yet the American court considering Israel's extradition request saw fit not to allow that dubious foundation to be eroded. The evidence available to Abu Eain strongly suggested that he was not present at the scene of the alleged terrorist incident of which he was accused of carrying out and that he was the victim of a coerced confession by an accomplice who didn't entirely understand the meaning of his own testimony. It was in Hebrew, he didn't speak Hebrew, and he later recanted that confession under rather convincing circumstances.

Subsequent to Abu Eain's return to Israel, there is also some indication that his rights had been abused, that he has not been fairly treated by the Israeli courts, and therefore, and that the extradition framework as it is supposed to operate—and I think as this American court assumed it would operate—was not adequate for the protection of minimal rights to avoid prosecution for his political affiliation and activities. I would suggest that the same thing would be quite likely to happen in the event that H.R. 5227's conception of judicial determination is upheld and becomes U.S. law—that it will certainly not be able to protect potential opponents, even nonviolent opponents of a government such as the Marcos government in the Philippines.

And therefore, one needs, it seems to me, to empower the courts to some degree to examine the probable-cause contentions and also to make some assessment of whether a fair trial is possible for the person who is to be extradited.

I think that it is also worth taking very careful note of the fact that entrusting discretion in these circumstances to the Secretary of State could be virtually tantamount to making the rights of individuals an incident of foreign policy.

Such a procedure doesn't even protect the United States against foreign policy embarrassment. In fact, it could have the opposite tendency. It tends to reinforce a more general foreign policy that the United States has been pursuing recently, which is to help repressive regimes who are allied to us to stabilize their political environment in relation to their opponents.

Extradition enables governments to reach out into our territory and put forward charges of alleged complicity in terrorism or nonexcludable activities as the basis for extending their repressive reach extraterritorially. There are strong indications, that, for example, the Philippines Government has already prepared the papers to extradite figures such as Aquino, who is presently here in the United States, is a democratic opponent of President Marcos, and who, in every reasonable sense of the term, should be considered, it seems to me, fully entitled to the protection of our society and not subject to any kind of extradition claim formalized in terms of criminal charges.

It is not at all clear what his status would be even under the preferred H.R. 5227 framework should the Philippines Government prepare a sophisticated allegation of probable cause.

Now let me try to say just a few more things of a general character before making a few specific suggestions. I think in the back-

ground of this whole inquiry is the historic effort to overcome the process that was characteristic of monarchies and predemocratic governments to exchange political refugees as a matter of State policy.

The whole idea, the whole historic idea of extradition, was to restrain that discretion of the State, the discretion of the executive, by making it subject to legally ascertainable standards which, in effect, means to judicial determination.

In the *Mackin* appellate decision, there is very good language, I think, that is taken from the 1852 decision of *In re Kane* that is even more applicable today than at the time it was enunciated, and I quote:

"Extradition without an unbiased hearing before an independent judiciary is highly dangerous to liberty and ought never to be allowed."

The *Mackin* decision goes on to say that this unbiased hearing before an independent judiciary is particularly necessary in cases where the political-offense exception is at issue.

Of course, it is conceivable that that political-offense exception will be granted in a manner that the executive branch disapproves. Indeed, the whole idea of judicial protection is to create that potential dissatisfaction by the executive branch because one wants to administer claims on the basis of standards that are not subject to the vagaries of foreign policy.

And, therefore, the price of protecting human rights and constitutional rights in any context is always the risk of a certain amount of tension between the judiciary and executive.

But to lack faith in the overall commitment to judicial process in this kind of setting is tantamount to lacking faith in democracy itself, because what we are really doing is no more than trying to protect realistically the rights of individuals who are engaged in political activity of a sort that underlies the history of many constitutional societies, including our own.

Struggles for new governing processes are a sacred part of the sovereign rights of every country, and I believe that it is a grave denial of our own best traditions to impair that right to any degree, and I feel that that right has been impaired to a significant degree by the recent tendency of extradition treaties to vest in our executive branch the power to determine the occasions on which the political-offense exception will be allowed.

It is, of course, a tendency that is reinforced by many of the governments which are negotiating these extradition treaties with, because they have themselves centralized all their authority in the executive branch and regard entrusting such matters to judicial institutions as an inconvenience and a conceivable burden on their policy.

But for us to go along with that kind of centralization of executive authority taking place overseas seems very unfortunate to me.

Furthermore, I think one has to look to the failure of the executive branch in other areas to uphold individual rights when they conflict with foreign policy expediency.

The application of the neutrality laws is one spectacular instance, where at the very time that we are providing military

training for anti-Sandanista exiles, we are trying to enforce rigorously the neutrality laws against Haitian exiles.

And, of course, the same double standards are relied upon with respect to grants of asylum and immigration and naturalization discretion. In other words, there is a clear political climate present in this country that suggests that it would be extraordinarily naive, if not cynical, to entrust the political offense exception to the executive branch; that it has not recently demonstrated, as one might otherwise argue, that it has sensitivity to the fair application of law when it comes to issues of this sort.

And therefore, I think it is exceedingly important that that part to the extent that H.R. 5227 reinforces the minimum conception of the judicial role that it be enacted and become law and to the extent possible, reshape our treaty practice.

Now, it must be faced that there is a legal problem posed by the inconsistency between recent treaties and this proposed legislation. And since both congressional legislation and treaties enjoy the status under the Constitution of being the supreme law of the land, there is a question as to the extent to which this legislation could really constrain the executive branch in negotiating future extradition treaties.

And if they were unconstrained, considerable confusions would result as to the content of prevailing internal law.

Mr. HUGHES. Let me just interrupt you, if I may, because you have touched on this point about three times. Let me see if I understand what you are suggesting.

You have made some arguments today that might be compelling to individuals in the Congress to reject a treaty. You have made some arguments that might compel the administration to not negotiate a treaty, but you are not suggesting that we try to rewrite the Constitution and to have this committee undercut, in effect, what is a negotiated treaty? Frankly, the judiciary cannot be put in a position to rewrite a treaty obligation.

Mr. FALK. No, Mr. Chairman, I am not suggesting that. What I am suggesting is that in view of these kinds of treaties with these kinds of governments, the statutory protection should be more sensitive to a situation in which the characteristic protection for an accused is being further eroded.

So what I am really saying is that these sorts of treaties being negotiated suggest the need to encourage courts a greater scope for inquiry than had been thought necessary in the past——

Mr. HUGHES. But the difficulty with that argument is that the Constitution grants to the President and to the Senate the treaty-making responsibilities of the country, and if, in fact, you delegate it to the judicial branch of the Government, the authority to undercut what they knowingly and purposely have done, then it seems to me that you are treading on a balance and a separation of powers that is essential.

You have cited the Philippine treaty, which has generated a great deal of controversy, and the administration is pursuing the treaty obligations and that is going to be debated on the basis of facts that exist in that country. Now, I don't think that we can write this statute that would in essence in any way undercut what

the administration and the Senate concurring in extradition treaty obligations knowingly and purposely have set as a national policy.

We can set some standards that will insure that in every instance treaties that perhaps might be negotiated with countries that are not as sensitive to human rights to other countries, we can write the statute so that rights are protected, but you know, I think that—maybe I misunderstood you——

Mr. FALK. I may have not been clear. I chose the *Abu Eain* case in part because Israel is a country which is usually thought to have a reasonably high level of constitutional order, yet even in such a context, with the present kind of statutory framework, the extradited individual was not provided with the minimum protection required to test fairly whether a proper basis for extradition existed.

It has nothing to do, in my judgment, with challenging the executive treatymaking power. What it has to do with is saying, given the way the world is constituted, and given the kinds of rights we are trying to protect, what is the appropriate statutory form in which to implement that protection?

And I am saying that if one adopts too formalistic an attitude toward probable cause or toward the inability to assure a fair trial once the individual returns to his country, then the political offense exception can be undermined even if the courts retain their authority over it.

Mr. HUGHES. So you are talking about basically the rule of noninquiry, among other things.

Mr. FALK. Yes.

Mr. HUGHES. How would you propose that we change the law to give the courts the authority to go beyond the allegation, often very sophisticated, of probable cause, so a court could make that type of a decision? How would we do that?

Mr. FALK. I have given some thought to that, and I believe, Mr. Chairman, that the best way to do it would be to say that normally one presumes the validity of the probable cause presentation and the adequacy of the legal system in the foreign society. The person whose extradition is sought would have the burden of showing exceptional circumstances to undermine that presumption.

In other words, it would not require a court routinely to make these kinds of underassessments, but it would allow judicial notice to be taken of special circumstances that exist in foreign societies.

I think we would have little difficulty realizing why we wouldn't want to return a leader of Solidarity to Poland if we had an extradition treaty at this time and our attitude would not shift even if such a person was charged with participating in activities that endanger the commission of violent acts within Poland at this time.

Mr. HUGHES. Let me just, if I may, play the role of the devil's advocate. If, in fact, on a government-to-government basis, we have negotiated an extradition treaty, then I think it is fair to assume that we have determined that we expect the sovereignty and the word of that nation.

Now, if, in fact, we were to reject an offer of probable cause on the part of a nation with whom we have a treaty, aren't we undercutting really our treaty obligations?

Mr. FALK. I don't believe so, because I think the treaty obligation incorporates this political-offense exception. All I am suggesting is

how do you make that realistic and effective under the conditions that exist?

I am not suggesting that if there is a genuine showing of probable cause that it shouldn't be honored. I am mainly pointing out that a sophisticated government can easily frame a showing of probable cause, as was done in the *Abu Eain* case, if it wishes to be unscrupulous about circumventing the political exception.

Mr. HUGHES. Isn't the answer for the executive branch of the Government, then, is to go back and renegotiate or abrogate the treaty or to take whatever steps are essential, because inherent in any treaty obligation is an extension of good will and respect for a sovereign?

If, in fact, we were to begin questioning for political or other reasons the words of the sovereign, then it seems to me we have to do that through the constitutional channel.

Mr. FALK. Isn't that what we in essence do every time we apply the political-offense exception? Because presumably the foreign sovereign would have to be pretty naive if it didn't formulate its charges against a foreign national, a national living abroad, in such a way as to avoid the literal language of the political-offense exception.

Given the types of governments with whom we are negotiating extradition treaties, it becomes important to extend the judicial inquiry into the context of the alleged offense to include its procedural surrounding as well as its substantive character.

And I believe that if this isn't done, the effect will undermine the whole fundamental intention of extradition as a means of establishing a balance between cooperative international law enforcement and the protection of individual human rights.

This concern would be much less intense if I didn't feel that the recent judicial practice of foreign governments reveals abuses of the extradition approach that have been more or less acquiesced in by our own executive branch.

Let me try to bring these remarks to a close by saying that it seems to me that the present political climate makes these issues very sensitive and important. The widespread anxiety about terrorism and hijacking among the public is allowing a pragmatically oriented executive branch, which has been pragmatically oriented long before the present administration took office. In this respect, my remarks are not directed primarily toward the present occupants of the White House. I think bipartisan issues are before this subcommittee. Under these very pragmatic pressures of dealing with genuine anxieties with terrorism, I believe that serious erosions of some of the proudest traditions of American society are being threatened. Congress can play a very important role in drawing a distinction, which I think is the essence of what your legislation tries to do, between legitimate protection of political figures and legitimate cooperation with foreign governments in the suppression of terrorism, while continuing to protect those who engage in political opposition to the government of their own country.

The only other specific comment that I would make refers to the effort by the subcommittee in trying to specify affirmatively in the legislation what constitutes the nature of political offenses.

I think that this is, on balance, not a constructive contribution. I understand its motivation to be an effort to standardize the application of law by the judiciary and as an effort to reassure the American people that we are not in some sense creating a vague open-sesame condition by offering a political-offense exception to an extradition request.

What I think happens as a consequence of this kind of formulation is that a foreign government can frame its charges against its overseas political enemies in such a way as to connect with the language of the statute. This enumeration of extraditable offenses will encourage formalistic treatments of the questions of the political offense issue. I would prefer to entrust a court with greater latitude and assume that it would be sensitive to the overall situation at stake. The circumstances vary so greatly from country to country, that courts require broad discretion to assess whether a political offense has been charged and that, therefore, the extradition request should be deemed in conformity with treaty obligations.

In other words, I do not have problems with legislative guidelines for the judiciary that deny political offense status to a list of enumerated activities covered by other treaties, for example, cooperation re hijackers. It is the attempt to supplement these positive guidelines that interferes with allowing courts to play their proper part effectively.

Let me stop there.

Mr. HUGHES. I gather from what you have said that by eliminating the positive criteria set forth in the legislation, you essentially agree that the approach taken is far preferable to that advanced by the administration and inherent in the Senate bill?

Mr. FALK. Oh, definitely. I think there is no comparison in that sense.

Mr. HUGHES. I want to tell you I have some concerns myself about the delineation of the specific items that are covered as political offenses, some for the reasons you have advanced and some for other reasons.

I appreciate your testimony. It has been most helpful. You have helped us put it all in a broader context, and we are indebted to you for that. It is a highly sensitive issue. It is probably going to be one of the more important issues that this subcommittee will take up.

I won't say it will be the most controversial, because if we do anything on handgun abuse, that will rate No. 1. But it certainly is one of the most sensitive issues and you have made a very positive contribution.

The record will remain open for 5 days. You may submit a formal statement and any other remarks that you want to make bearing on these issues.

Mr. FALK. Thank you, Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Falk.

TESTIMONY OF WADE HENDERSON, LEGISLATIVE COUNSEL, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. HUGHES. Our next witness is Wade Henderson. Mr. Henderson appears before us today as legislative counsel representing the American Civil Liberties Union.

The ACLU is a membership organization that has long been active in articulating constitutional issues in congressional testimony.

Mr. Henderson, we have received a copy of your written statement and, without objection, it will be made a part of the record.

Please proceed as you see fit.

Mr. HENDERSON. Thank you, Mr. Chairman. I am pleased to appear before you to offer the comments of the American Civil Liberties Union on H.R. 5227, the Extradition Reform Act of 1981.

Congressional effort to revise Federal criminal laws will be worth while only so long as it achieves a balance between the complementary public interests in individual rights and crime control.

In that regard, we have reviewed the pending extradition bills in both the House and Senate. S. 1639 and S. 1940, the extradition legislation introduced in the Senate, pose grave threats to constitutional rights, and we strongly oppose these bills.

On the other hand, H.R. 5227 strikes a more acceptable balance among the interests to be served in reform of our extradition laws.

The Senate bills are problematic for several fundamental reasons. S. 1639 and S. 1940 would make major adjustments in current law in a manner substantially at odds with principles of due process of law.

These changes would result in the elimination of protections of individual rights which have evolved through over a century of judicial interpretation, executive treaty commitments and Senate ratification.

In their place, S. 1639 and S. 1940 would establish an extradition process undoubtedly subject to political manipulation.

While several elements of the Senate bills are troubling, perhaps their most serious flaw can be found in those provisions which would strip the Federal courts of jurisdiction to review individual claims that extradition should be denied on the grounds that the offense charged is one of a political character.

These provisions are a radical change in current law; they represent an unwarranted shift in Government authority to the exclusive control of the executive and, thereby, pose an inherent danger to civil liberties.

The ACLU opposes the extradition of any person within the United States to a foreign country, without first affording that person a judicial determination in this country of the issues involved in the extradition.

The ACLU is particularly opposed to any extradition policy which would permit extradition of persons, to any country, who are charged with conduct that is the exercise of a civil liberty, such as freedom of speech or assembly, or the expression of political opposition to a foreign government.

The ACLU also opposes extradition of persons which would result in trials in foreign countries which do not afford rights of

due process, sufficient to assure a fundamentally fair hearing, or for which the penalty of death may be imposed.

These principles are the bedrock of an extradition policy which is responsive to the demands of crime control as well as diplomacy, but which is mindful of critical concerns for individual liberties, due process and human rights.

H.R. 5227 is only partially attuned to these concerns; however in fairness to the bill, current law provides even less protection.

Although the bill would codify much of current law by preserving the jurisdiction of the Federal courts to make decisions about political offenses and would make additional reforms such as the enumeration of the offenses to be excluded from consideration, H.R. 5227 would nonetheless leave several critical gaps in our extradition policy which could be appropriately addressed in the spirit of genuine law reform.

An analysis from our prepared statement serves to illuminate the civil liberties and due process problems which are left unresolved.

Section 3194 of H.R. 5227 establishes the basis of the extradition hearing and court order. As noted, we support H.R. 5227's retention of court jurisdiction in this sensitive area of our criminal law.

The exclusion of the Federal courts, as is proposed under the Senate bills, is a direct assault on the constitutional protections of American citizens and foreign nationals alike. Because the United States is one of a minority of governments that surrender its own citizens to face trial for alleged crimes committed abroad, adequate judicial protection of first amendment and other fundamental constitutional rights must be preserved.

Provisions which purport to transfer such protection into the exclusive jurisdiction of the executive, where it will be subject to the often volatile political arena of international diplomacy, should be rejected.

It is in this regard that H.R. 5227 poses certain problems. Sections 3194(e)(1) (a) and (b) would vest the Secretary of State with exclusive authority to review claims of the violation of freedoms of speech, assembly and religion, due process and equal protection of law and other human rights.

These provisions give rise to significant concerns. First, given the applicability of bilateral extradition provisions to citizens and foreign nationals alike, should the courts be barred from reviewing constitutional questions regarding the sufficiency of first amendment, due process and equal protection standards to be provided in a foreign trial?

The fact that a "rule of noninquiry" is currently embodied in American law on extradition, is itself no justification for a codification of the principle under exclusive jurisdiction of the Secretary of State.

Second, what standards will govern the discretion exercised by either the courts or the Secretary in determining when constitutional or humanitarian concerns require the denial of extradition?

Surely, as in the case of defenses to extradition, the Congress should resolve ambiguity and inconsistent application of standards through an explicit statement of legislative intent.

The ACLU recognizes that the exigencies of diplomatic relations can sometimes require consideration of factors unrelated to civil liberties in weighing extradition requests.

But that does not mean that basic liberties can be overridden by diplomatic considerations. The exigencies of diplomacy render claims that constitutional rights have been violated particularly unsuitable to discretionary review by the executive branch; conflicting interests would undoubtedly result in an inconsistent and unfair application of standards.

The integrity of constitutional standards would be difficult, if not impossible to preserve under such a system.

The development of appropriate standards for determining whether a foreign State is seeking extradition for the purpose of prosecuting a person because of that person's political opinions, race, religion, or nationality, requires careful consideration.

The review of State Department or other official reports on human rights conditions and the state of the judiciary of any country seeking extradition would seem a minimal requirement for the development of workable standards.

Such reports could be drawn from a variety of recognized sources, and in the statement we list several that we believe would be appropriate. Whether the resolution of these questions be placed in either the courts or the Secretary, some enumeration of factors to be considered should be required.

We note with favor H.R. 5227's effort to resolve the anomaly of the political crimes exception under present law. Merely because the offense charged was committed with political motive in the course of an uprising should be no basis alone for the denial of extradition.

The enumeration of the offense excluded from the definition of a political offense and the listing of so-called pure political crimes, may be helpful in objectifying the court's decision.

However, some assessment of the requesting State's capacity for justice, pursuant to concerns for due process, should govern the determination of any final order.

There are additional provisions in H.R. 5227 which codify current law curtailment of the rights of American citizens. These threats arise from the general applicability of foreign extradition law to American citizens and the failure to incorporate our own constitutional standards in determining probable cause for extradition.

I must emphasize that the fact that these provisions extend to American citizens, as well as to foreign nationals, does give rise to a particular source of concern for us.

Under sections 3192 and 3194 governing the arrest and evidence required to authorize extradition, it appears that a citizen may experience the irony of having his government enforce a lesser standard of constitutional protection against him on behalf of a foreign government than could otherwise be done if the charges originated in this country.

Such an anomaly could occur if treatymakers, under provisions of the bill, were permitted to set standards of proof inconsistent with the constitutional standards of the United States.

An equally dangerous paradox can be found in those provisions which would authorize detention of persons sought to be extradited for up to 60 days without demonstration of probable cause, and in a manner wholly incompatible with the principles of American constitutional law.

Section 3192(e) would implicitly suspend the right of bail of persons sought to be extradited. The only way in which such a person could be released following arrest would be if the evidence and documents required by the applicable treaty have not been filed with the court within 60 days.

Again, differential constitutional standards would pose a setback to citizen's rights.

Assuming other provisions of the bill may allow certain standards to be established to determine the appropriate time, if there is an appropriate time, for the use of detention, that certainly would minimize the damage that might be done under 3192, but from a policy standpoint, we oppose preventive detention at any time.

Standards for determining bail should be the same for those awaiting extradition as for all other criminal defendants. Provisions of the Bail Reform Act should be uniformly applied.

As a matter of established constitutional principle, the accused is presumed innocent until proven guilty at trial, and freedom may not be lawfully restricted except by the minimum condition necessary to assure appearance at trial, and for no other purpose.

Clearly, no justification has been asserted in the bill which warrants setting aside these principles.

Under section 3198(c)(2), the court is provided with broad discretion to determine standards for release on bail, including consideration of applicable treaty obligations and general concern for community safety.

While the presumption of innocence does not prohibit all restriction on an accused person, there is a sharp constitutional distinction between restrictions necessitated by the criminal justice process itself and restrictions which purport to protect the community.

Vague community safety standards are unacceptable, even in the context of extradition, because they erode the constitutional presumption of innocence.

We are enclosing for consideration by the subcommittee, as an attachment to this testimony, a statement of the ACLU position on pretrial detention.

Last, the bill provides that either party may take an appeal from the determination of an extradition hearing. Section 3195 would permit the Attorney General to appeal an adverse extradition decision on behalf of a foreign government without specifying the standards to govern the decision to appeal.

Such a provision is particularly threatening to the right of citizens since an extradition hearing is essentially designed to determine probable cause for prosecution.

Since under our constitutional system, the Government cannot appeal the refusal of a grand jury to indict, it should not be permitted to appeal a denial of extradition. Without further justification, we believe this provision should be deleted from the bill.

H.R. 5227 would make several laudable improvements in the current law of extradition. However, the bill would also carry forward

several areas of current law which impinge on due process and civil liberties protections of citizens and aliens alike, thereby erecting a practical barrier to further reform.

It is highly unlikely that the Congress would be prepared to take a new look at these provisions, given the nature of the issue.

Resolution of these concerns is appropriate in the development of a fair extradition policy. We urge the subcommittee to make the changes we have recommended.

Thank you for this opportunity to present our views.

[The testimony of Ira Glasser follows:]

TESTIMONY OF IRA GLASSER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION AND MARTIN MICHAELSON, ESQ., ON H.R. 3006; H.R. 4264, BAIL REFORM ACT AMENDMENTS

Mr. Chairman and Members of the Subcommittee, the American Civil Liberties Union appreciates the opportunity to present its views on H.R. 3006 and H.R. 4264, which would amend the Bail Reform Act to provide for pre-trial detention of defendants who have been found dangerous to the community. The ACLU is a nationwide, nonpartisan organization which is dedicated to the preservation and enhancement of rights guaranteed by the Constitution.

In recent months, the issue of violent crime committed by persons awaiting trial has risen once again to the forefront of the debate on crime control. A number of bail reform proposals have been made in Congress, and the Attorney General's Task Force on Violent Crime has made recommendations in this area. Insofar as these proposals would authorize imprisonment of defendants believed likely to flee before trial, the ACLU does not object to the proposals because they are consistent with the Constitution and necessary to the administration of justice. Insofar as these proposals would curtail the abuses of the existing money-bail system, under which bail is sometimes set so high that only the wealthiest defendants can make it, the ACLU supports the proposals as a major advance for civil liberties.[1] Insofar as legislative proposals provide for speedy trials, the ACLU enthusiastically agrees that this is an efficient, effective and constitutionally appropriate method of dealing with the problem of crime committed by defendants on bail.

However, the proposals before this Subcommittee, H.R. 3006 and H.R. 4264, go beyond these desirable objectives. These bills would authorize judges to imprison untried persons not to ensure their appearance at trial, but to keep them off the streets. Proponents refer to this as "preventive detention."

For many years, the American Civil Liberties Union has opposed pre-trial imprisonment except where that sanction is required to ensure the defendant's appearance at trial. The ACLU policy is consistent with long-standing United States practice, and has roots in the presumption of innocence and the rights to due process of law, trial by jury and bail guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution. The ACLU believes that "preventive detention" is a misnomer. Instead of eliminating crime, "preventive detention" would add to it, by making hardened criminals of persons needlessly imprisoned before trial, as we show below. "Preventive detention" would also and necessarily deprive many innocent persons of freedom, the most cherished civil liberty.

The constitutionality of pre-trial detention has been debated among legal scholars for many years. In our judgment, H.R. 3006 and H.R. 4264 violate the well-established constitutional principles that the accused is presumed innocent until proven guilty at trial, and that freedom may not be lawfully restricted except by the least restrictive means required to assure appearance at trial. *Jackson* v. *Indiana,* 406 U.S. 715 (1972); *Stack* v. *Boyle,* 342 U.S. 1 (1951). As the Supreme Court has said, "This traditional right to freedom before conviction permits the unhampered prepa-

[1] The Bail Reform Act of 1966 attempted to come to terms with the practice of imposing money bail for purposes beyond those permitted by the Constitution, *i.e.,* for purposes other than ensuring appearance at trial. See generally, Foote, *The Coming Constitutional Crisis in Bail,* 113 U.PA.L.Rev. 959 (1965). D. Freed and P. Wald, Bail in the United States (1964). There is a substantial body of evidence that the Bail Reform Act has not resulted in a decline in abuse of the money bail system. See P. Wald, *The Right to Bail Revisited: A Decade of Promise Without Fulfillment,* in S. Nagel, The Rights of the Accused (1972); P. Weiss, Freedom for Sale (1974). Thus, defendants who present no risk of flight are still detained for long periods of time prior to trial because of an inability to meet excessively high money bail.

ration of a defense, and serves to prevent the infliction of punishment prior to conviction . . . [U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951).[2] Giving government the power to imprison people without a trial and merely upon a judge's guess about future dangerousness stands these fundamental principles on their head. Imprisoning many of the innocent in the hope of imprisoning a few of the guilty is not in the American tradition.

The pending "preventive detention" proposals would sharply curtail individual liberties without having any positive effect on crime. Studies have shown that only a small percentage of defendants commit crimes while on bail. A Harvard University study, for example, involved a random sample of 427 defendants in Boston who were released on bail. Of the 427, only 4 committed serious crimes during the first 60 days after they were released.[3]

Another study, not yet public, conducted by the Lazar Institute for the United States Department of Justice, has found that, at best, "preventive detention" would cause a very slight decrease in the arrest rate of defendants awaiting trial.[4] "The Lazar Institute, Pre-trial Release: An Evaluation of Defendant Outcomes and Program Impact," Summary and Policy Analysis, U.S. Department of Justice, March, 1981 p. IX, (hereinafter Lazar Institute). According to that study, only 1.9 percent of all defendants released before trial are convicted of and imprisoned for serious crimes while on release.[5] This strongly suggests that pre-trial release is not an important cause of serious crime, and that even if all defendants were detained while awaiting trial, no substantial reduction in the overall rate of serious crime would result. What would result from such a policy would be the needless and wasteful imprisonment without trial of massive numbers of people.

Of course, no one proposes to imprison all defendants awaiting trial. Everyone agrees that would be clearly unconstitutional. It would also be impossible, given the physical capacity of the existing prison system. For those reasons, "preventive detention" advocates endorse the detention of only those defendants who if released would be dangerous.

Is it possible to predict who among a given group of criminal defendants would, if released, commit a serious crime? If only 1.9 percent of released defendants are convicted of and imprisoned for a serious crime committed while awaiting trial, is it possible to tell in advance which individuals will constitute that 1.9 percent? The clear answer is no. Every study of this question demonstrates that neither psychiatrists nor judges can make such predictions with any reliability, and that in order to imprison a significant portion of that 1.9 percent, a dramatically large percentage of persons who will not commit crime if released would have to be imprsioned as well.[6]

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[2] See Foote, supra; Meyer, *Constitutionality of Pre-trial Detention*, 60 GE.L.J. 1139 (1962); Tribe, *An Ounce of Detention: Preventive Justice in The World of John Mitchell*, 56 VA.L.Rev. 371 (1970).

[3] A. Angel, *et al.*, *Preventive Detention: An Empirical Analysis*, 6 Harvard Civ.Lib.-Civ.Rts.L.Rev. 317, 360 (1971). Seven empirical studies cited at footnote 276 of the Angel article (pages 347–48) corroborate these findings.

[4] Convictions for pre-trial crime must be distinguished from pre-trial arrests. The pre-trial rearrest is not a reliable indicator of pre-trial crime. It is a commonly accepted police practice to consult lists of defendants who had been released on bail when investigating a crime. This method necessarily leads to a greater probability of false arrests for defendants who are awaiting trial than for other members of the community. The conviction rate, therefore, is a more reliable indicator of pre-trial crime.

[5] The pre-trial arrest rate is somewhat higher. Of the 3,488 defendants in the eight-site sample of local jurisdictions studied by the Lazar Institute, 85 percent secured pre-trial release. Lazar Institute, p. 6. Of those individuals released, 84 percent were not subsequently arrested while awaiting trial. *Id.* p. 6. Therefore, only 16 percent of the total number of individuals released were arrested again while awaiting trial. *Id.* Moreover, what counts in law enforcement is not the number of arrests but the number of good arrests, that is, arrests that result in convictions. Measured by this standard, the Lazar Institute study is more significant. Less than half of those arrested—7.8 percent of all those released—were convicted of crimes for which they were arrested while awaiting trial on the original charges. *Id.*, p. 227. Of those who were convicted, only 3.8 percent of all released defendants were ultimately imprisoned for crimes committed while awaiting trial on another charge. The study also found that one-half of those jail sentences were for less serious crimes such as prostitution, drunkenness, disorderly conduct and driving while intoxicated. *Id.* These are hardly the serious crimes involving personal violence that most people have in mind when they evaluate preventive detention as a possible remedy.

[6] See American Psychiatric Association, *Task Force Report on the Clinical Aspects of Violent Individuals*, 28 (9174); Cummings and Monohan, *Social Policy Implications of the Inability to Predict Violence*, 31, Journal of Social Issues 153, 156 (1975); Kozol, Bourcher and Garofolo, *The*

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Many innocent persons would have to be locked up in order to deter very few guilty ones.

The Lazar Institute study has confirmed findings of these studies that dangerousness is almost impossible to predict. Lazar Institute p. 247–53. To achieve even a slight reduction in the rearrest rate, and a negligible reduction in the re-conviction and-imprisonment rate, would require the wholesale imprisonment of innocent persons and an unprecedented increase in pre-trial detention. As the Lazar Institute found, even the best state-of-the-art indicator of future criminality, applied to a control group by scientists with the benefit of hindsight, was wrong half of the time. *Id.* at p. 254.

The conclusion of Wenk and his colleagues (1972) that "there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is true for both juveniles and for adults. It holds regardless of how well-trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided. More money or more resources will not help. Our crystal balls are simply very murky, and no one knows how they can be polished. Monahan, *Ethical Issues In The Prediction of Criminal Violence, supra,* at 10.

Similarly, studies of psychiatrists' predictions of dangerousness show that they are wrong about 95 percent of the time. Ennis and Litwack, *supra.* Even when such predictions are based on a proven history of anti-social acts in the recent past they are still wrong two-thirds of the time. *Id.* There is thus no way to imprison people based on behavioral predictions except at the price of liberty of many who would not be dangerous and would not commit crime if released. We have attached as an appendix to this statement an article that explains this phenomenon in detail.

Furthermore, the defendant jailed before trial may suffer loss of employment, dissolution of ties to the community and disruption of family life. In addition, the jailed defendant is less able to prepare an adequate defense—detention reduces access to potential witnesses and lawyers. Defendants jailed before trial are substantially more likely to be convicted and receive longer sentences than defendants released on bail.[7]

The cost of pre-trial imprisonment is enormous. "The wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars.[8]

The proposed legislation, in our view, would increase crime. It is well known that pre-trial imprisonment contributes substantially to the creation of a class of hardened criminals. Prisoners who have not been found guilty are placed in institutions such as jails and detention centers which are "overcrowded, understaffed, poorly funded, oppressively regimented, [and] openly abusive of the fundamental human rights of prisoners. . . ."[9]

In many respects, persons detained in jail prior to trial are subjected to even worse conditions with less chance for rehabilitation. In a recent sampling of convicted prisoners, twelve of thirteen preferred the penitentiary to the jail in which they were held before trial. The indelible impact of this incarceration, the exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure, leave many defendants hardened, embittered, and more likely to recidivate once released, than they were before incarceration.

While this human toll is great by any measure, the effect of preventive detention is doubly tragic. Because many of the defendants are young, possibly balanced on a

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Diagnosis and Treatment of Dangerousness, 18 Crime and Delinquency 371 (1972); Wenk, Robinson and Smith, *Can Violence Be Predicted,* 18 Crime and Delinquency 393 (9172); J. W. Locke, *et al., Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study, Washington, D.C.,* National Bureau of Standards, U.S. Department of Commerce (1970); John Monohan, University of California, Irvine, *Ethical Issues in the Prediction of Criminal Violence,* a paper delivered at the Conference on Solutions to Ethical and Legal Dilemmas in Social Research, Washington. D.C., February 25, 1980, at 10; Rubin, *Predictions of Dangerousness in Mentally Ill C[illegible]s,* 21 Arch. General Psychiatry, 392 (1972); Diamond, *The Psychiatric Prediction of Dangerousness,* 127 University of Pennsylvania Law Review, 439 (1974); Bruce J. Ennis and Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 California Law Review, 693 (1974).

[7] See, Arthur R. Angel, *et al., Preventive Detention: An Empirical Analysis,* 6 Harvard Civil Rights—Civil Liberties Law Review 300, 347 (1971). Seven empirical studies, cited at footnote 276 of the Angel article (pages 347–48) corroborate these findings.

[8] Botein, *Shifting the Center of Grovity of Probation* quoted in Angel, *et al.,* supra, at 351.

[9] Angel, *et al., supra,* at 351 (footnotes omitted).

thin line between a life of crime and productive citizenship, the impact of incarceration on their subsequent criminality may be acute. Those found not guilty after 60 days of confinement are nonetheless inflicted with psychological harm and social stigma that many never be erased.[10]

"Preventive detention" is therefore a highly misleading term. It will not prevent crime. To the contrary, it is more likely to contribute to crime by making hardened criminals out of prisoners who may have been guilty of nothing when sent to jail. In the words of Sam Ervin, "preventive detention legislation . . . is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem."[11]

What, then, can be done about crime committed by people awaiting trial? Certainly the ACLU does not advocate that such crime be ignored. We believe that speed trials are an effective and constitutional alternative to "preventive detention." Speedy trials will reduce pre-trial crime while preserving individual rights. The ACLU strongly supported the Speedy Trial Act of 1975. This Act will not be fully implemented until 1983. It is therefore premature to consider the Draconian and ineffective device of preventive detention before other, less drastic remedies have been tried.

Many studies show that authorizing speedy trials would dramatically reduce the incidence of crimes committed by persons awaiting trial. For example, District of Columbia data show that "crime on pre-trial release in D.C. appears to be directly related to the number of man days [the defendant is] released."[12] As the Harvard study cited above showed, only 4 of 427 defendants released on bail committed serious crimes during the first 60 days after they were released.[13] Another study based on comparable data, prepared by the Commerce Department, showed that "Persons classified as dangerous appear to exhibit a greater propensity to be rearrested the longer they are on release."[14] Available evidence also suggests that the least likely times of rearrest are shortly after arrest and just prior to trial;[15] thus, speedy trials are likely to be highly effective in reducing pre-trial crime. Indeed, one commentator has recently concluded that if the Speedy Trial Act of 1975, which will require trial within 70 days of indictment, is ever fully implemented, that change alone would cut pre-trial crime in half.[16]

The empirical evidence that speedy trials reduce crime is consistent with the practical experience of federal judges. For example, Judge George L. Hart testified in Congress as follows:

"Every criminal trial, except for extraordinary circumstances, should be tried within 6 weeks to 2 months, and if this were done, I would seriously doubt that you would need to amend the Bail Reform Act to provide for preventive detention."[17]

Judge Harold Greene testified to the same effect:

"If we could have trials in 6 weeks to 2 months, the entire problem of crimes while on bail would disappear, because not that many crimes are committed in the first 45 to 60 days. Also the mere fact that a speedy trial is available would be a much greater deterrent to crime than what we have now, when it takes a year to a year and a half to have a criminal case tried in the district court. The delay exacerbates also all the constitutional problems."[18]

In summary, it is both intolerable and unconstitutional to lock up the innocent with the guilty in the vain hope of preventing pre-trial crime. The power to imprison a person who has not been proven guilty, based on a "prediction" that he may commit a crime in the future, carries enormous dangers for civil liberties. Once established, such a power would lend itself to frequent abuse and would begin to undermine the presumption of innocence on which our criminal justice system is based.

Congress must also consider whether a pre-trial imprisonment policy, even if it withstood constitutional attack, would reduce crime. Because considerable violent crime may be the fruit of pre-trial imprisonment, "preventive detention" is more

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[10] *Id.* at 352-53 (footnotes omitted).

[11] Sam J. Ervin, Jr., *Foreward: Preventive Detention—A Step Backward for Criminal Justice.* Harvard Civil Rights—Civil Liberties Law Review, 291, 292 (1971).

[12] Locke, *supra*, at 189.

[13] Angel, *et al., supra*, at 317, 360.

[14] Locke, *et al., supra*, at 165.

[15] *Id.*

[16] Steven Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 Fordham Law Review, 40, 46 n. 40 (1980).

[17] Amendments to the Bail Reform Act of 1966, Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) at 10–11.

[18] *Id.* at 41.

likely to exacerbate than to reduce the crime problem. Both in its sweeping application to the innocent as well as the guilty, and in its likely negative impact on the violent crime problem, a "preventive detention" policy would potentially victimize all Americans. Such a policy should be rejected as both unconstitutional and unwise. Examining ways to implement more effectively the constitutional requirement of a speedy trial would be a far better course to take.

Thank you for the opportunity to present our views.[19]

Mr. HUGHES. Thank you, Mr. Henderson. I would ask you the same question I asked Professor Falk.

In several places throughout your testimony, you refer to an assessment of the capacity for justice in the requesting jurisdiction, and my question is, Aren't we really overstepping our constitutional bounds?

Where a sovereign has negotiated a treaty with another sovereign, isn't that one of the factors that is considered by the President and by the Senate in deciding whether to approve treaty obligations?

Mr. HENDERSON. You may be right. I am not certain I could attest to what factors are taken into account by the sovereign, but I believe that those would be some factors taken into account.

Our concern stems from the fact that these treaty provisions would extend full coverage to American citizens as well as foreign nationals.

The constitutional standards and protections that have been set for American citizens, the consideration of due process, protection of first amendment and other fundamental civil liberty freedoms, as well as other equitable judgments that may impact on our decision to extradite, we feel should not be undercut by the U.S. Government.

We prefer to believe that our own Constitution protections can be established or elevated to embrace foreign nationals and citizens as well.

We think some assessment of the ultimate circumstances of the decision would have to be taken into account before we could authorize, as a government, the sending of one of our own citizens abroad.

Mr. HUGHES. It seems the difficulty with that is it oversteps what I conceive to be the constitutional delineation of authority among the branches of government. I don't know that this country should be engaged in treaty obligations looking toward extradition with countries that are not going to protect the rights of those that we extradite.

Maybe we ought to be abrogating treaties or negotiating them again or taking other steps on a nation-to-nation basis. It was never intended by the framers of the Constitution to permit a backdoor type of interference with what is, in effect, the province of the President to carry out foreign policy and negotiate treaties.

Mr. HENDERSON. What we are suggesting is that perhaps through the development of standards of information to be considered, whether it be by the court, as we believe it should be, or whether it be by the Secretary of State, as is currently provided under the

[19] David Landau, ACLU Legislative Counsel, and Ann McCambridge, Legislative Associate, ACLU Washington Office, participated with us in the research and preparation of this testimony.

bill, the articulation of standards and information to be considered in helping to reach that decision, we think is appropriate; nor do we believe it essentially violates the separation of powers as you have outlined.

Mr. HUGHES. If you were to decide between existing law or this legislation, which would you rather have?

Mr. HENDERSON. As noted, we think the bill makes several improvements over existing law.

Mr. HUGHES. What is wrong with the Government having the right to repeal a decision by a lower court that might be wrong?

Mr. HENDERSON. Assuming the safeguards of the legislation as proposed would be incorporated into our system and that a hearing for probable cause could be established, we see no reason to provide a second shot at securing an indictment or the equivalent——

Mr. HUGHES. Judges make mistakes, particularly when you have nations. We obligate ourselves, commit ourselves to another nation to carry out treaty obligations.

As a matter of policy, we don't permit lower courts generally to make basic decisions for us, particularly where it might be an embarrassment to this country.

What is wrong with the Justice Department appealing what is perceived to be an erroneous decision by a lower court?

Mr. HENDERSON. We believe the standard of probable cause is set sufficiently low and can be controlled by the treatymakers themselves in the establishment of extradition treaties that any potential concern that might arise from a failure of a lower court to make an appropriate decision——

Mr. HUGHES. What if the appeal is on the subject of the political question, whether or not it is a political offender, and the right is given both parties to appeal? What could be fairer than that?

Mr. HENDERSON. If the issue were narrowed in such a manner that the question was only on the question of whether the act charged falls within the parameters of the political offense, that may or may not be objectionable.

We think that the attempt by your committee to specify the kinds of crimes that would be exceptions to that rule make the kind of concern that you have articulated somewhat remote.

We feel that the courts can fairly make an assessment of what requirements should be taken into account in the determination of probable cause and we feel that the standard is sufficiently low to basically cover any potential situation that might arise.

Mr. HUGHES. Mr. Henderson, you likewise have been very helpful to us, and we are indebted to you for your testimony. You have furnished us with some avenues that we should pursue and I would invite you to submit for the record some testimony perhaps on how we can improve upon the humanitarian sections of the bill.

I have indicated that some standards should be developed and you have indicated standards should be developed in fulfilling the responsibilities of determining the motives for seeking extradition and we would invite such additional material that you would like to submit on those subjects.

Mr. HENDERSON. Thank you. We will be happy to and we will try to do so.

Mr. HUGHES. The record will remain open for 5 days so that you can do that. I think that concludes the witnesses.

The hearing stands adjourned.

[Whereupon, at 12:32 p.m., the subcommittee was adjourned.]

EXTRADITION REFORM ACT OF 1981

WEDNESDAY, FEBRUARY 3, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 2:10 p.m., room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes, Kastenmeier, Hall, and Sawyer.

Staff present: Hayden W. Gregory, chief counsel; David Beier, assistant counsel; and Deborah K. Owen, associate counsel.

Mr. HUGHES. The Subcommittee on Crime of the House Committee on the Judiciary will come to order.

The Chair has been advised that there is a request to record for radio and televison by electronic and photographic means the proceedings here this afternoon.

Without objection, under rule 5(a), that will be permitted.

Without objection, so ordered.

This afternoon, the Subcommittee on Crime continues a series of hearings on the reform of the American laws relating to extradition.

As I indicated at the time of introduction, December 15, 1981, this bill grew out of a concern that our current extradition laws were not sufficient to meet the challenges of transnational crime.

Through this set of hearings, we hope to receive testimony from various interested parties about the legal and practical problems that exist under our current extradition laws.

We also hope that various witnesses will make suggestions about reforms in the laws that will enable us to more effectively respond to the increased level of terrorism and drug trafficking on the international level.

The bill that is the subject of our hearing today is an attempt to improve current Federal law while at the same time retaining the basic framework for processing extradition cases.

I think that many of the changes suggested by the bill are relatively noncontroversial and acceptable to both the administration and persons who represent individuals being sought for extradition.

In addition to these less controversial improvements, several policy questions exist concerning which various commentators and experts have already expressed some strong differences of opinion.

Two major areas of controversy involve the issue of bail and the question of who should decide the so-called political offense question.

Two other areas that emerged during our last hearing concerning the rule of noninjury and the role of the courts in looking at the initiatives of the country requesting extradition.

For purposes of clarity, let me explain how the bill deals with each of these issues.

H.R. 5227 preserves current Federal law by permitting the courts to make assessments of whether the person who is being sought for extradition committed a political offense.

The bill also retains current law by leaving the question of assessing the motivation of the requesting State to the executive branch.

With respect to the issue of bail, the bill provides for access to release pending the extradition case in manner that is consistent with the treaty obligations and the rights of individuals.

Finally, the bill has the net effect of preserving the existing Federal law on the rule of noninquiry.

In sum, the position taken in H.R. 5227 has been to retain current law where possible, and to reform it to the extent that a case for change had been made out. Last week, we heard from the administration concerning their recommendations that the political offense question should be left to the Secretary of State.

With them, as with all of our witnesses, the burden of establishing the need for a change from the current law is placed on the proponents for change.

It is, therefore, most helpful to the committee if the witnesses can address their testimony in such a way as to identify which of their suggestions represent departures from current law.

Also, it will be helpful to have specific suggestions as to how the proposed change would operate in practice.

We are looking forward to hearing from an interesting array of witnesses today. Our witnesses include William Goodman, a defense attorney from San Francisco, and Profs. Steven Lubet and Cherif Bassiouni.

Finally, we have a panel of persons involved in recent extradition cases. Through the testimony of these witnesses and the benefit we have already derived from written statements received from other interested parties, we will be in a better position to assess the correctness of the policy choices made in H.R. 5227.

Our first witness today is William Goodman, attorney for Topel & Goodman in San Francisco, Calif.

Mr. Goodman, would you come forward.

Mr. Goodman is a practicing attorney from San Francisco, Calif. He is a graduate of the University of California Law School at Berkeley.

After his graduation, he served as a clerk on the California Supreme Court and as a Federal public defender in the northern district of California.

Mr. Goodman has litigated a large number of extradition cases, including several cases where the political offense question was an issue.

Mr. Goodman, we are pleased to have you with us today. We have received a copy of your written statement, and, without objection, it will be made a part of the record.

Please proceed as you see fit.

TESTIMONY OF WILLIAM GOODMAN, ATTORNEY, TOPEL & GOODMAN, SAN FRANCISCO, CALIF.

Mr. GOODMAN. Thank you very much, Congressman Hughes.

I appreciate the opportunity to testify this afternoon before the subcommittee on what I think is a very important piece of legislation.

It appears to me that apparently my representation of Peter McMullen has generated a bit of controversy in the Justice and State Departments and apparently, in no small part, has resulted in an effort to take away from the courts the jurisdiction to decide the political offense exception.

I think the provisions of H.R. 5227, which retain the jurisdiction of the courts to decide that issue, are good in most respects.

I certainly believe that it would be a grave mistake to allow the decision on the issue of the political offense exception to be solely within the discretion of the Secretary of State.

I feel the Secretary of State and the Department of State would not be responsive to a number of issues that can very easily be decided and, indeed, have very clearly been decided by magistrates, and Federal district court judges in the distant and more recent past.

I do not agree with the position of the State and Justice Departments that these are sensitive issues that are outside the scope of and competence of the judiciary to decide.

I have some reservations about certain language in the bill concerning the political offense exception. I think there is a degree of ambiguity in one subdivision concerning unlawful political advocacy that could present problems of interpretation for the courts. I think to some extent, the limitation on the concept of political advocacy to exclude, at least by the phraseology of the statute, acts which are likely to incite imminent violence or imminently incite violence would perhaps unduly, that blinds a court to the actual political realities at the time the allegedly unlawful political advocacy occurred.

I likewise have some concern about what appears to be a presumptive exclusion of any crime of violence or most crimes of serious violence from the scope of the political offense exception.

I am no advocate of or apologist for acts of violence, but I think again that it has to be determined on a more case-by-case basis since, in the past, virtually every case in which the political offense exception has been litigated in a nonfrivolous way, has involved a crime of violence.

I think it again is blinding a court to certain political realities to presumptively exclude that type of crime. I might add, though, that I think many of the other presumptive exclusions, such as drug offenses, crimes against internationally protected persons, aircraft hijacking and a crime such as rape should be presumptively ex-

cluded. I wouldn't see any reason why there shouldn't be an irrebuttable exclusion of most of those offenses.

But I do have concerns about what appears to be a presumptive exclusion of a crime of violence.

I also note that the sections which presumptively exclude certain offenses does not address the issue which is addressed by the courts of the predicate showing of an existence of insurrection or an uprising or civil war.

It seems to me that perhaps it is sensible not to include that kind of language in the statute because it would be too difficult to frame adequate language.

On the other hand, if in a political offense exception litigation situation the defense could show the existence of an insurrection, uprising or civil war, as is presently required by the case law, I would interpret the legislation, in effect, to render the crime, the underlying crime, not "normal", if you want to call it that.

It would, in effect, be "abnormal" because the crime would have occurred at a time when an insurrection or uprising was occurring. In my opinion the crime would, therefore, be covered by the judicial interpretations, as they presently exist, of the political offense exception.

I have also some concerns on the issue of bail, again from my practical experience in representing now probably eight or nine defendants in international extradition cases.

I agree with the substantial modifications that have been made to incorporate the Bail Reform Act standards into the statute, although as I read the statute, the Bail Reform Act, per se, is not incorporated.

It has, in effect, been modified by adding certain factors and putting more flexibility into the bail decision, all of which, I think, are probably appropriate things to do in international extradition cases.

However, it has been my personal experience that defendants in international extradition cases, particularly if they are American nationals, probably pose the least flight risk of any defendant you will ever find in any kind of criminal case.

There is just no incentive for people like that to leave because only in this country do they have fairly elaborate procedural protections. Likewise, travel documents usually have to be surrendered as a condition of bail anyway.

As a practical matter none of the defendants I have ever represented who are Americans, posed the remotest risk of flight.

I have found, among foreign nationals I have represented, who are here legally, the same de minimis flight risk existed. It is another question if someone is here illegally. In the day-to-day application of the bail laws, I don't think people like that ever end up getting bailed out.

They are obvious flight risks and accordingly, either no bail is set or bail is set very high.

I don't have any particular problem with the idea of taking into account the seriousness of the offense, even though that is not a factor in the Bail Reform Act, because again, the day-to-day application of the bail standards by magistrates virtually always takes the seriousness of the offense into account.

I think it is naive to assume otherwise.

I do object to certain features of the bill, particularly section 3196(c)(4), which has a Government right to appeal a magistrate or district court judge's bail decision.

As far as my research discloses, the Government has no such right in any other criminal proceeding in Federal court. I feel that the appropriate position for the Government to be placed in if they are dissatisfied with the magistrate's bail decision is, if they have additional information to come back to that decisionmaker at a later time, to submit a motion to revoke or increase or otherwise modify the bail conditions.

I think that a Federal appeals court, which would be the court of resort for the Government on appeal under the provisions of the bill where bail is in question, is not well suited to make such initial bail decisions.

A Federal appeals court is the right place to decide issues of bail pending appeal, where a record has been made after trial in an ordinary Federal criminal case.

But in a pretrial situation, it seems to me from a practical point of view, a Federal appeals court is far, far removed from the realities of the decisionmaking process in bail.

I don't think it is appropriate for the Government to have the right to go to them to seek relief. If that is going to be included in the bill, I certainly think explicitly the bill should also include some right of the defense to pretrial bail review by the Federal appeals court.

Theoretically, the defendant has that right now, but in order to include a somewhat more balanced approach, at least by the language of the statute, some recognition of the defense right to appeal the district court or magistrate bail decision ought to be included.

One other concern I have is with respect to bail on section 3195(a)(3), which talks about the discretionary part of the power of the appeals court concerning bail when the Government appeals.

Now, as I read that section, this is in the situation where the defense has prevailed and extradition has been denied and the Government is now appealing under the new bilateral appeal procedures included in the bill for review of that decision.

As I read the statute, the appellate court only has the power under the statute to hold the defendant at that point without bail. I think that would be totally inappropriate. First of all, the defendant might already have been out on bail at the time of the district court hearings.

Second, the defendant has prevailed so it is the Government which is now in the position of seeking review in a higher court. The Government ought not have the benefit in the court of appeals of holding the defendant without bail.

It would be more appropriate, if there is going to be such power in the appellate court, which I have no inherent disagreement with, that the appellate court have authority to set whatever bail conditions it considers necessary to continue to assure the presence of the defendant at any later time if the case is reversed on appeal.

I have no particular objection to the bilateral right to appeal. I think the present process is totally cumbersome for the defense

with the writ of habeas corpus and the unreasonably restricted scope of review.

From my experience, I would prefer to have the Government have a right to appeal, rather than risk the possibility of judge-shopping with refiling.

I think that the appearance of justice and the possibility of justice, in fact, is much greater if we have an orderly appellate process, than if we have the Government losing in front of one magistrate and proceeding to file before another magistrate who they decide may be more inclined to rule in their favor.

I have never liked the judge-shopping approach that occurs in extradition and I find that the bilateral appellate rights are a preferable approach.

I have some concern, also, with the statute of limitations language in 3194(d)(2)(a), which I think eliminates the statute of limitations defense where the treaty is silent on the issue.

I strongly feel that the statute of limitations, being a jurisdictional element of any Federal crime, is also a provision that ought to exist in any international extradition proceeding where there is a statute of limitations for the underlying offense under Federal law.

The statute of limitations protects defendants from the very real possibility, particularly in extradition cases, of stale evidence, lost witnesses, lost memories of events that have occurred far, far in the past. Unless the 5-year Federal statute of limitations with the appropriate provisions as interpreted by the courts is included in the section 3194(d)(2)(a), there otherwise is a risk somebody could be extradited for an offense that they could never be tried for in this country.

In 3198(d), there is no language concerning the appointment of expert witnesses at Government expense. I realize that title 18, United States Code, section 3006(a), which is the Criminal Justice Act, covers that.

The present law, has a section dealing with the appointment of witnesses at Government expense. I feel that it is conceivable that the statute might be interpreted as not hereafter allowing the payment of witness' fees at Government expense where the defendant is indigent.

Since that can be crucial to the defense of the case and since there are a fair number of international extradition cases involving appointed counsel, I would prefer to see some language in the statute dealing with that problem.

[The statement of Mr. Goodman follows:]

SUMMARY OF WRITTEN STATEMENT OF WILLIAM M. GOODMAN, ESQ.

I favor most of the provisions of H.R. 5227. I strongly support the retention of the jurisdiction of the courts to decide the political offense exception. While I think the definitional language in § 3194(e)(2) is unnecessary, language defining the political offense exception in § 3194(e)(2) is a reasonable attempt to establish the scope of the defense in a manner consistent with the present case law. The modified Bail Reform Act provisions should also be incorporated into any reform of international extradition. From substantial practical experience representing defendants in international extradition cases, I believe that the "special circumstances" rule in the Senate Bill is unfair and wholly unresponsive to the actual risk of flight which the defendant poses in an extradition proceeding. I disagree with inclusion of a government right to appeal the magistrate's bail decision.

I disagree with § 3194(d)(2)(A) which I read as measuring the statute of limitations only by the law of the requesting party where the treaty does not include a statute of limitations defense.

I agree with the bilateral right to appeal (§ 3195(a)(1)), the re-filing limitations (§ 3192(a)(2)), the venue change provision (§ 3192(c)) and the provisional arrest warrant period (§ 3192(e)). I find the provisions of § 3194(d)(1)(c) somewhat mechanical and probably unnecessary to achieve the apparent goal of determining trends in the law.

LAW OFFICES OF TOPEL & GOODMAN,
San Francisco, Calif., November 11, 1981.

Re international extradition law discussion draft and S. 1639, Extradition Act of 1981.

Congressman WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUGHES: Thank you very much for requesting my comments on the proposed changes in international extradition law contained in S. 1639 and in the House discussion draft that you sent me. I have enclosed a copy of the letter I sent to Senator Thurmond which sets forth my comments on and criticisms of S. 1639. As you will see from my comments on the discussion draft prepared by your Subcommittee staff, I believe your draft is far preferable to S. 1639. However, as I stated in my letter to Senator Thurmond and his staff counsel, I believe that statutory removal of federal court jurisdiction to decide the political offense exception defense is misguided and probably unconstitutional. If the House version, with its somewhat flexible definition of the political offense exception, is modified to permit application of the proposed statutory standards by the courts, then I believe the House version would probably provide adequate protections for the accused. However, if the House version removes the issue from the jurisdiction of the courts, the effort to define the exception for application by the Secretary of State will be rendered meaningless in the absence of statutory guarantees that the Secretary's decision can be subsequently scrutinized by the courts through use of habeas corpus procedures and application of a suitably flexible standard of judicial review.

The comments below are keyed to the sections of the House discussion draft. I have omitted comments on those portions of the House draft which I believe involve relatively minor and basically neutral procedural matters.

§ 3192(a)(1): This version is better than Senate version since it may help to prevent Justice Department forum shopping in the District of Columbia. I believe that some change of venue provisions should be expressly incorporated in the bill as set forth in my discussion of § 3192(2) in the Senate bill.

§ 3192(2)(B): Inclusion of what amounts to a double jeopardy prohibition is entirely justified. This provision implicitly recognizes that an international extradition proceeding is criminal and not sui generis.

§ 3192(d): I do not agree with limiting the provisional arrest period to thirty days. Foreign governments already have difficulty complying with the forty-five day period. Shortening that period even more will probably do little to encourage prompt submission of the formal extradition request. Furthermore, the accused often needs as much time as possible to prepare to defend against the extradition request. Shortening the provisional arrest period will put an even greater and unnecessary burden on defense counsel to prepare for the formal extradition hearings in circumstances where counsel is already burdened by the serious problem of obtaining documents, witness statements and other information from overseas.

§ 3194(b)(3): The broader language of the House provision (compared with § 3194(b)(2) of the Senate bill) is far preferable, and will permit the accused to litigate all appropriate issues before the magistrate. While the scope of the extradition hearing is somewhat limited, the statutory language in the House bill will give the magistrate the latitude necessary to assure that the accused has a full and fair opportunity to present his defenses.

§ 3194(f)(2): I strongly believe that the statute (rather than the treaties alone) should incorporate all of these defenses.

§ 3196(b): As stated in my letter to the Senate Committee, I do not believe that jurisdiction over determination of the political offense claim should be removed from the federal courts. I have no difficulty with the House bill's effort to define in general terms the political offense exception. I believe inclusion of the word "normally" in § 3196(b)(2) must reflect Congressional recognition that under certain lim-

ited circumstances a court could decide that acts falling within subdivisions (A) through (F) of § 3196(b)(2) could satisfy the political offense exception standards. I might add that I can conceive of no case where rape could possibly satisfy the political offense exception. In view of this country's concurrence in conventions concerning airplane hijacking, I feel it is completely appropriate to exclude those offenses from the scope of the political offense exception. In any event, I do not believe airline hijacking can ever satisfy the present judicial standards for the political offense exception. For a more detailed discussion on the jurisdictional question, see my letter to Senator Thurmond at pages 3-7.

§ 3198(c): I strongly approve of inclusion of the Bail Reform Act provisions. The "special circumstances" rule presently used in international extradition proceedings and codified in the Senate version is unfair and places an unreasonable burden on the accused. The Bail Reform Act provisions will adequately assure the appearance of the accused, particularly where the accused is an American citizen. If the accused is truly an international fugitive, strict application of the Bail Reform Act provisions will undoubtedly result in the setting of a high bail or no bail in certain limited circumstances. My comments on § 3192(d)(1) of S. 1639 explain in more detail why rigid adherence to a "special circumstances" bail rule is inappropriate.

I would be happy to discuss these comments further with you, other members of your Subcommittee and members of your staff. As one of the only lawyers in this country who has represented a number of persons in international extradition cases, I believe I can offer a different and practical perspective on the issues involved in this area of criminal law.

Yours very truly,

WILLIAM M. GOODMAN.

LAW OFFICES OF TOPEL & GOODMAN,
San Francisco, Calif., January 19, 1982.

Re H.R. 5227, International extradition.

Congressman WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUGHES: Thank you for requesting my comments on H.R. 5227. On the whole, I think H.R. 5227 is an excellent proposal for modernizing international extradition procedures. The bill is, in my opinion, superior to S. 1639 in virtually every respect in which the two bills differ. H.R. 5227 is much more fairly balanced legislation which provides the degree of procedural and substantive fairness to the accused which is often missing in the Senate bill.

If there is support in Congress for some modification of the political offense exception in international extradition proceedings, the provisions of H.R. 5227 are a reasonable attempt to define the scope of that defense. While I do not believe there is a need to include such definitions in the statute—since the judicial decisions on the subject have adequately and fairly defined and interpreted the political offense doctrine—I recognize that some statutory definitional language is probably unavoidable. If that is the case, H.R. 5227 provides a structure for the political offense exception which seems reasonable and flexible enough to permit the judiciary to discharge its decision making responsibility in that area.

The following comments are keyed to the sections of H.R. 5227 which I believe deserve further comment or modification.

3192(a)(2): While this provision is not equivalent to a double jeopardy bar, it will discourage judge shopping where the first extradition request is denied and no new facts can be offered in support of a second extradition request. I think this provision is essential to a fair extradition process and is the best method to prevent government forum shopping.

3192(c): This provision is excellent. It sensibly incorporates mandatory venue transfer to the district where the accused is found and eliminates the unfair burden of a District of Columbia forum for persons residing or found elsewhere.

3192(e): As I stated in my previous letter, the 30 day provisional arrest warrant period suggested in the House draft and even the 45 day period in the present statute are too short. The 60 day provisional arrest period, which is also included in the Senate bill is more realistic.

3194(d)(1)(C): This provision is somewhat peculiar. There is no question that dual criminality is established if the conduct for which the extradition is sought constitutes an offense under the laws of the United States and the demanding country. Incorporation of the reference to the law of the state where the fugitive is found has

precedential support in numerous early international extradition decisions which placed far greater emphasis on state law than does modern extradition law. In light of those precedents, inclusion of that provision [(C)(iii)] is not objectionable, although it seems to reintroduce state law concepts that have been largely abandoned in modern federal decisions. I do object to the (C)(ii) provision concerning "the majority of the States". Such a provision strikes me as unreasonably mechanical. I doubt that many magistrates (or, for that matter, many prosecutors) are going to be willing to analyze the law of the fifty states to determine if twenty-six or more states agree on the criminality of particular conduct. If such scrutiny is needed to determine criminality, it strikes me as highly unlikely that the framers of the particular treaty in question (at least on the United States' side) intended that such conduct be a basis for extradition.

If it is the intent of the bill to allow extradition where the present trend in state or federal law is to criminalize the conduct which is the subject of the extradition request, using a mechanical test such as "majority of the States" is unfair to both the government and the accused. For example, is it fair to the government if 25 states (but not 26) criminalize particular conduct? Likewise, is it fair to the accused if 26 states have criminalized particular conduct by statute but most of those states either have not prosecuted under those statutes because the statutes are archiac, or because the statutes have not been interpreted, or have been given conflicting interpretations?

I believe that the magistrates are capable of interpreting the trends in the law to determine if the conduct is viewed as criminal in this country. I would therefore suggest a more flexible provision than (C)(ii) which would allow the courts to interpret trends in the criminal law without being obligated to rule on the basis of numerical majorities.

3194(d)(2)(A): As I read this section, if the applicable treaty does not specify a statute of limitations defense, the § 3194(d)(2)(A) statute of limitations defense will only be measured by the law of the requesting party. In view of the jurisdictional nature of the statute of limitations in all federal criminal offenses to which a statute of limitations applies, I believe that the five year federal statute of limitations should also be incorporated into this section. I find it unfair to eliminate the bilateral statute of limitations feature from this section when that bilateral feature has almost always been included in the treaties.

3194(e)(2): I am gratified to see that the bill maintains the jurisdiction of the courts to decide the political offense exception in the first instance. As I stated in my previous comments on the draft version of this bill, I believe that inclusion of the word "normally" in (e)(2)(B) recognizes that there may be extraordinary situations in which a court could find that the acts set forth in (e)(2)(B)(i)–(vii) could satisfy the political offense exception.

3194(g)(1)(B): This subsection may conflict with the Federal Rules of Evidence to the extent that Rule 1101(d)(3) states that the Rules do not apply to extradition proceedings.

3195(a)(1): The appeal procedures are a needed and sensible modernization in extradition law for both the government and the accused.

3195(a)(3): This section appears to give the appellate court the power to hold the accused without bail if the Attorney General makes the requisite showing. While inclusion of discretionary language is certainly appropriate, I believe this section should be modified to state that the appellate court can impose any additional bail conditions which will assure the continued presence of the accused rather than simply ordering the accused to be held without bail.

3196(c)(1)–(3): I agree with including some factors in addition to those set forth in the Bail Reform Act. I wholeheartedly agree with the bill's rejection of the outmoded "special circumstances" bail test which appears in the Senate bill. The special circumstances rule as presently set forth in the case law and as described in the legislative history to S. 1639 is unnecessary. The accused in an international extradition proceeding is often either an American citizen or a foreign national living and working openly in this country. Such persons have far less motivation to fail to appear for court hearings than defendants in ordinary criminal cases because: (1) they are trying to convince a judge not to order them extradited to a foreign country. The best way an attorney and his client can convince a judge of the accused's basis trustworthiness is to make sure the accused appears in court as ordered; (2) bail conditions in extradition cases always entail surrender of passports or other travel documents, making unauthorized departure from the country extremely difficult; (3) particularly in the case of United States citizens or foreign nationals living here legally, there is no motive to flee the country, since those persons will be unable to live or work in most other countries without immediate detection and

usually with very minimal extradition protections. Under the provisions of the Bail Reform Act, and the additional factors set forth in § 3196(c)(3), very high bail would always be set where the government can adequately establish that the accused was actually fleeing from the demanding country or was otherwise what might be called an international fugitive. It is clear that if the accused has illegally entered the United States, the risk of flight upon release is potentially greater, and bail will undoubtedly be higher. Likewise, if the crime charged is extremely serious and would ordinarily result in very high bail under the day-to-day application of the Bail Reform Act, a similar bail is going to be set for in an international extradition case.

3196(c)(4): I disagree with inclusion of a government right to appeal on the issue of bail. As far as I know, the government does not have such a right of appeal in any other criminal proceeding. I believe a magistrate or district judge is particularly competent to decide the issue of bail. If the government believes that there are additional facts which were not considered by the judge, the proper procedure as in any criminal case is for the government to present its new evidence to the extradition judge in support of a motion to revoke, increase, or otherwise modify the bail previously set.

I would be happy to discuss the comments further with you or other members of your Subcommittee and staff. If a mutually convenient date can be arranged, I will testify before the Subcommittee in late January or early February.

Thank you again for requesting my opinions about this important legislation.

Very truly yours,

WILLIAM M. GOODMAN.

Mr. HUGHES. Thank you.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I am not that familiar with the subject. I appreciate the witness' comments.

I assume you think more equitable or consistent decisions would be made by the courts than by judgments emanating from, say, the Department of State. You proceed from the notion that we ought to clarify the law with respect to the primary jurisdiction remaining with the courts to handle these matters rather than being handled administratively by the State Department.

Is that correct?

Mr. GOODMAN. That is correct. I might say, I can't say there would be perfect consistency in the decisions of various Federal courts on the political offense exception. But past cases have indicated a fair degree of consistency in the application of the political offense exception. Certainly enough consistency.

I can live with it. I have had a lot of these cases.

Mr. KASTENMEIER. I am not familiar with the cases. I notice that we have in our folder here some analysis of the *McMullen* case.

Mr. GOODMAN. That was my case.

Mr. KASTENMEIER. You felt that was fairly decided.

Mr. GOODMAN. I must say yes.

Mr. KASTENMEIER. How about the *Eain* case?

Mr. GOODMAN. Abu Eain.

Mr. KASTENMEIER. Yes.

Mr. GOODMAN. I was not involved in that case.

Mr. KASTENMEIER. I know you weren't.

Mr. GOODMAN. I have some question about some of the language of the seventh circuit decision but the decision itself, I think, was inevitable. The decision to not sustain the political offense exception contention in that case was inevitable because there was a failure of proof. There was no proof that I am aware of, or there was insufficient proof that I have seen from the decisions that I

have read, establishing the existence of an uprising or insurrection in Israel.

Mr. KASTENMEIER. In other words, if the respondent in that case had been more aggressive in presenting his case, he might have prevailed?

Mr. GOODMAN. I don't want to say that because I tend to think no matter how aggressive he might have been, he would have lost.

Mr. KASTENMEIER. Do you think it is distinguishable from the *McMullen* case?

Mr. GOODMAN. Yes, I think that particular case is. I think that case is because, as I understand, there was not an adequate showing made connecting this particular act—which was placing a bomb in an open area and killing a number of civilians—and either the Palestine Liberation Organization or its objectives.

It appeared to be an act of random violence that was attempted. The defense attempted to cloak the act with the protection of the political offense exception. But they couldn't prove it.

If you can't prove it, as far as I am concerned, that is the end of the inquiry.

Mr. KASTENMEIER. The purpose of my pursuing this is to determine whether or not the courts are capable of consistency in dealing with the cases, any more so than perhaps political judgments made by the Department of State in connection with the extradition situation.

Mr. GOODMAN. I think that they are. I think they have been and I think that they are. Yes.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Kastenmeier.

Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. I tend to agree with your view on the removal of that political exception from the Federal courts. I am a little concerned about your statement—as I understand it—that you would superimpose, as one possibility, the Federal 5-year statute of limitations.

I assume then you would not go along with the extradition of any of the Nazi war criminals?

Mr. GOODMAN. That depends. If an argument can be made that the statute of limitation has tolled because one was a fugitive from justice, then the statute has not run. It also depends if they are charged with murder. There is no statute of limitations for murder.

Mr. SAWYER. I would have to assume in most of the cases that they would have left the country where the offense was committed, which would have tolled their statute.

If they had stayed in the United States more than 5 years, would it be your opinion that they had effectively tolled our 5-year statute? How do you handle that?

Mr. GOODMAN. You mean they stopped the running of the statute or let it run out?

Mr. SAWYER. No, if, for instance, they fled to the United States, and were here for 10 years before being apprehended. Would our 5-year statute have tolled or would it apply because of their having fled Germany?

Mr. GOODMAN. The case law—I am litigating that now in another IRA case—doesn't have to do with quite the same offenses, but I think the case law is unclear.

If it is viewed that they fled the demanding country, in effect fleeing from justice, which is the justice of the demanding country, since the time they left. Then the statute is tolled. It hasn't run out.

On the other hand, let's say they have lived openly and identifiably and not under a false name. For example, if Adolph Eichmann had lived in the United States under the name Adolph Eichmann for years after he left wherever he was and he wasn't charged with murder, the statute might run out.

But if he is charged with murder, there is no statute of limitations. If somebody is fleeing from justice, the statute has tolled. If they are living under an assumed name or manner that prevents their apprehension, I think the argument can be made that they are fugitives and therefore, the statute has not run.

Mr. SAWYER. If our police forces took the same view the police forces took in the South American countries, you wouldn't be worried about the extradition situation in the *Eichmann* case at all.

Mr. GOODMAN. I understand. I used that only as an example.

Mr. SAWYER. Under most laws, at least those that I am familiar with—and I am not an international lawyer, so in many foreign countries this may not be true—but within the United States, tolling is not coupled with a necessity of having disguised your identity or hidden in some other jurisdiction. The statute is tolled by your absenting yourself from the jurisdiction wherein either the civil or criminal liability arose.

Mr. GOODMAN. I think it is both. I think there is case law that talks in terms of not only absenting yourself from the jurisdiction, but taking and doing other acts which prevent you from being apprehended, by going underground, changing your name, or avoiding contact with the police in a way that suggests that you are trying to keep them from finding out who you are.

It is a strange area and it is even stranger when you apply it to international extradition. I agree there are some areas of confusion there. For example, the American-British treaty that is still in operation explicitly includes the statute of limitations of either country as a defense. That has been interpreted in the Federal courts here to mean the Federal statute of limitations of 5 years for any crime for which there is statute of limitations. So the treaties——

Mr. SAWYER. I come back to the thing that confuses me. Assume that both England and the United States have a 5-year statute, whether they do or not.

Mr. GOODMAN. OK.

Mr. SAWYER. Is the statute tolled if he leaves England after 2 years and if he has been in the United States for 6 years? Has he got a statute offense or not?

Mr. GOODMAN. I don't mean to sound too much like a defense attorney, but it depends why he left or what the circumstances were of his leaving.

Mr. SAWYER. He is a fugitive. He got out because he was afraid to be arrested.

Mr. GOODMAN. What could he do here? If he came and lived openly under his own name and in a manner where he would have been apprehended or could have been if anybody had bothered to initiate the extradition, the statute of limitation might run.

Mr. SAWYER. So he moves to Keokuk, Iowa, and lives on a farm under his regular name. He makes no overt effort to conceal his name, but not many British would know where Keokuk, Iowa, is. I don't either.

Mr. GOODMAN. It would depend on when the charge was formally filed in England. If the offense occurred, say, in 1974, and the criminal charge was not filed in England until 1980, it would not matter when he left England.

The statutes of limitations would have run. Forget about whether he was living openly or not.

If the criminal charge was filed within the 5-year statute in England, it would have been filed within the 5-year statute in the United States, and would not have run out, irrespective of what he is doing here.

A lot depends on when the charge is filed in the demanding country and finding an equivalent event here that tolls the statute here.

Mr. SAWYER. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Sawyer.

Mr. Goodman, you put your finger on one of the central issues. If I understand your testimony, you have some concerns over what amounts to a total exclusion of acts of violence from the consideration of political offense.

Mr. GOODMAN. Yes.

Mr. HUGHES. You go on to suggest that you have no difficulty with having drug abuse in that category.

Mr. GOODMAN. No, I personally don't, because I don't think——

Mr. HUGHES. Let me take it one step further. In many parts, for instance, Burma, the insurgency in that country is financed through trafficking in heroin.

Mr. GOODMAN. You said what?

Mr. HUGHES. The insurgency that exists in that country.

Mr. GOODMAN. Yes.

Mr. HUGHES. So if an individual were to flee to this country, for instance, in some way connected with the insurgency, you would exclude that and yet you have difficulties with our efforts to exclude acts of violence.

Do you find anything inconsistent with that?

Mr. GOODMAN. Maybe there is a certain degree of inconsistency, but I don't see a direct-enough nexus between, for example, a Burmese general or quasi-military official who has his little poppy field out somewhere raising money purportedly to finance insurgents and what they are doing—I think the essence isn't who is financing somebody, it is what the insurgents themselves are doing in their efforts to overthrow the government.

I think there is a point at which you simply have to draw the line. I would be prepared to draw it at a point where you deal with the acts of the people who are, as it were, on the front lines, rather than those who are behind the scenes, because otherwise you are

going to get an absurd amount of the use of political offense exception.

Mr. HUGHES. Let me take you to the front lines, then.

You apparently can understand the exclusion of hijackings.

Mr. GOODMAN. Yes, I can. That is right.

Mr. HUGHES. How do you differentiate between that and the bombing of a building?

Mr. GOODMAN. I think, again, it has to be based on a case-by-case analysis. I think there may be a view that aircraft hijacking, has an international element to it and affects not only those within the country where the insurgency may be occurring, but arguably may affect people who are passing through or have the misfortune of being on the plane. That risk is so great that there has to be an absolute prohibition against that kind of conduct.

Mr. HUGHES. How about where the building is at the Olympics, and internationals are exposed to that risk?

Mr. GOODMAN. I see no way that could have qualified for the political offense exception, because, as I see it, you must have the insurrection predicate. There was no insurrection in Germany when the Israel weightlifting team was killed.

I find that the predicate showing of insurrection, an uprising, is critical and is basic to this exception.

Mr. HUGHES. If I understand, you think it has more to do with the failure to provide in the statute some nexus to a political uprising or civil strife or insurgency or some other activity.

Is that what gives you concern over the criteria that we have used in the bill defining those acts of violence that are excluded?

Mr. GOODMAN. That is right. But I recognize those are difficult concepts to statutorily define.

Mr. HUGHES. How would you define the type of situation that you envision should be part of the bill?

Mr. GOODMAN. Well, I suppose the best definition I can give is from past experience. I would define it as activity of a well-recognized, organized group whose political objectives is one directed at taking control of a government or eliminating the government presently in power in order to substitute another government for it. That it is not, for example, the Italian Red Brigade situation, a group of terrorists who have no clearly defined political program other than terrorism for the sake of terrorism and presumably some pie-in-the-sky notions about no more oppression from the ruling class.

That is not my idea of what falls within the scope of the political offense.

Mr. HUGHES. I am not sure what you mean by organized.

Suppose the captors of General Dozier happened to escape and came to this country and Italy sought their extradition. How would you apply it?

Mr. GOODMAN. I do not think they could prevail for two reasons. First, I think there is no insurrection or uprising occurring in Italy that is extensive enough, if one exists at all, to fall within the concept of the political offense exception.

Second, I don't think that that organization has enough definition to it in terms of either its membership or objectives to fall within the political offense exception.

Mr. HUGHES. They sure did a good enough job for a long period of time interrupting the operation of government.

There was a time when they were having some difficulty keeping people in public office because of the acts of violence directed at the government, right?

Mr. GOODMAN. I agree. There have been acts of violence directed at the government that have been disruptive. But there is no defined objective to that activity beyond just disrupting the present governmental structure in Italy.

I don't think that is what the political exception is designed to do.

Mr. HUGHES. I understand your point. I guess I think the bottom line is I just draw the line a little differently than you would.

You mentioned your concerns over bail. I don't know where you get the impression that the defense would not have the right to appeal, as with the Government, under the legislation.

You also question the right to bail after a decision has been rendered adversely to the Justice Department. Under those circumstances, I think again your concerns are relatively unfounded because actually the court can decide either way on that issue, depending on the circumstances.

So I think the legislation has sufficient flexibility in it that protects the rights of individuals. It is for the court to decide whether bail is to be accorded after reviewing all the evidence. And it accords both parties the right to appeal that decision.

Mr. GOODMAN. Well, as I say, as I read through the bill, I had the impression that the Government's right to appeal was unilateral and that there was no defense right to appeal. If there is, I would think that would suffice.

I do have some lingering concern about the appellate court's power with respect to bail when the Government has lost an appeal.

As I read the statute, I got the impression that the appellate court either had to hold the defendant, I think that is the language, and it doesn't talk in terms of with or without bail.

I was assuming that that might mean it would be a no-bail situation while the Government appeals.

I also assumed that if a person has been out on bail previously, that a court would have the discretion to allow that bail status to remain in effect. If that is the case, then I have no concern about that provision.

Well, thank you.

Mr. HUGHES. You have been most helpful to us and we are indebted to you for your testimony.

Mr. GOODMAN. Thank you for the opportunity to appear.

Mr. HUGHES. Our next witness is Prof. Cherif Bassiouni. Professor Bassiouni teaches at the College of Law of DePaul University in Chicago.

He is recognized as one of the leading scholars in the area of international law. He has written a number of definitive treatises on international law.

In addition, Professor Bassiouni has served our Government as a legal consultant in several instances.

Professor Bassiouni, we have received a copy of your written statement, and without objection, it will be made a part of the record.

We hope that you can summarize.

TESTIMONY OF CHERIF BASSIOUNI, COLLEGE OF LAW, DePAUL UNIVERSITY, CHICAGO, ILL.

Mr. BASSIOUNI. I concur in the original remarks the chairman made concerning the need to improve and update the extradition laws of the United States, but I am not too sure that I share the basic premises that have been advanced as the bases for that.

The need to update the extradition laws of the United States exists for a variety of technical and practical reasons. The reason we find fault with these laws is essentially that they provide a variety of opportunities for, common criminals, to draw out the process of extradition over an extensive period of time. It is not because extradition contains loopholes that benefit international criminals.

If one looks empirically over the last 10 years, one finds only a few cases involving the political offense exception, to the best of my knowledge, there were less than five granted over this period of time.

So to place the emphasis on the political offense exception as the premise for the change in the law of extradition is not founded empirically.

Among the policy questions that have to be considered is how Government-oriented the proposed act ought to be in relationship to the type of minimum guarantees of due process that should continue to exist in this extradition process.

Though I share the concerns of others in discussing the problems of the political offense exception, I am much more concerned with the absence of a definitive standard of probable cause which prescinds from whether or not the probable cause exists in the treaty. It would seem to me that having a statute that does not have a standard of probable cause, and under which a person can be arrested on provisional arrest with nothing more than a telex, then sent to a requesting State on nothing more than an arrest warrant if the treaty so provides, provided that it is procedural and authenticated, notarized and translated, would in my judgment seriously curtail basic standards of justice in the United States and should be considered much more critically than it has.

I would like to address myself to some of the more technical aspects of the act as opposed to broader policy questions.

I would like to recommend that in the definition of treaties, the definition be enlarged so as to include specific reference to reliance on multilateral treaties since it is the intent of the act to allow the United States to rely on multilateral treaties for extradition, as well as bilateral treaties.

The United States is a signatory to a number of international conventions in the field of international criminal law containing such provisions and I think that it should be stated explicitly.

The provisional arrest provision should be examined more carefully in view of the fact that it is possible that an individual under the terms of the provisional arrest and special bail provisions be

placed in the impossible position of having to prove a negative, that is to show under what circumstances that person should be released on bail, and thus remain detained for a period of 60 days on practically no showing on the part of the requesting government.

The legislation should state certain standards more clearly so as to be a general guideline to treaties.

There is a technical question with respect to the relationship of extraditable offenses and double criminality. I agree with the present formulation that extraditable offenses and findings are to be determined on three possible alternatives, the laws of the United States, the laws of the state where the individual is found, and the majority of the laws of the involved states.

There should however be a link between that requirement and evidentiary findings, that is if double criminality is found, not on the basis of Federal law, but on the basis of state law, then the standard of probable cause and sufficiency of evidence should be established on the basis of that law.

With respect to the waiver provision it is important that the individual be notified of what he is waiving, that he has the benefit of all the documentation that is necessary and there be a specific link between waiver and the rule of specialty so that somebody does not waive extradition for the crime of burglary and finds himself charged with 15 different crimes not included in the waiver upon return to the requesting state.

The rule of specialty should be stated, though it is a customary rule of international law, and the United States has relied upon it. It is one that benefits not only the relator, but the U.S. Government in making sure that its processes will not be used improperly by a foreign government.

A formulation could be if the requesting state would like to prosecute the individual for a crime other than for which he has been extradited, that it must make a showing to the U.S. Government of probable cause and allow the Government in this case to waive the rule of specialty.

Again, going back to the issue of probable cause, I think it is indispensable that the legislation provides for probable cause. I realize that some of the treaties will try to do away with probable cause, but I think the legislation ought to be very forthright on the matter and require probable cause in all cases.

I think there is an incongruity here because there is no case in which the Supreme Court has said that probable cause is required for extradition. The reason for that, in my judgment, is because the Supreme Court and other courts have found that probable cause is required for purposes of an arrest which is inexorably linked to extradition.

And, therefore, since there has been no cases in which the arrest is completely severed from the extradition and probable cause is the same standard applicable to both, the Supreme Court probably did not see fit to address the issue of probable cause as a constitutional standard for extradition. This may also be because it is in the existing legislation.

If it is removed from the legislation, or if the legislation makes it optional and a treaty removes the standard of probable cause, it

seems rather incongruous that an individual could be arrested subject to probable cause and then extradited without probable cause.

I realize that a technical argument could be made to show the difference between the two issues, but they are so closely related that it really isn't worth the reduction of basic minimum protections of human rights of individuals in our criminal justice system to remove that guarantee.

The rule of noninquiry to which the chairman referred presents two sets of problems. The first has to do with whether or not the U.S. courts will inquire into the treatment that a person will be subjected to in the requesting country. For example, a given system may provide that a person may be punished in such a way that it would constitute in our view cruel and unusual or inhuman or degrading treatment. The question then is whether or not U.S. courts will look into the type of treatment and punishment that an individual is likely to receive. This is particularly true of legal systems which have corporal punishments which are unconstitutional in the United States.

So far, our jurisprudence has always held against such inquiry. I would be in favor of a rule that permits U.S. courts to examine whether or not an individual, upon return, will be subjected to cruel and unusual punishment. I would suggest that we might contemplate legislation that would provide for an alternative that such individuals would be prosecuted in the United States, using traditional conflict of laws—that is, the U.S. procedures—and the substantive laws of the states wherein the crime in question was committed, and apply U.S. penalities as if the crime would be a U.S. crime.

The other set of problems relating to noninquiry arises with respect to an individual claiming that he is being requested for purposes of being persecuted. That is, the individual is not claiming that the crime for which he is being requested is of a political nature, but that the purpose of the prosecution is for his persecution or might lead to his persecution.

We have under our Immigration and Naturalization Act provisions for political asylum which embody the 1967 protocol amending the 1951 Convention on Refugees, which specify clearly what standards to apply in case a person may be subject to persecution on the grounds of race, religion, or ethnicity in a particular country.

The act could include the same standards of the Immigration and Naturalization Act and allow the magistrate in the extradition proceedings to make that determination in the same manner that the immigration judge would make that same determination to avoid having two different standards that could be applied in two different ways.

With respect to the political offense exception, I believe that the standards set forth by the U.S. judiciary, ever since we have started the extradition practice in the late 1700's, are standards which are fairly clear. My predecessor has expressed them and I am sure in prior testimony, other people have stated them as well. I think the judiciary is perfectly capable and trustworthy in carrying out the application of this standard as it is with respect to the administration of criminal justice as a whole.

What we need, however, are legislative guidelines which can be drawn from the precedents that we have and from careful study of the problems that the application of these precedents raise.

We also need a specific addition to that. Namely, what I would refer to as the exception to the exception and that is the removal from the political offense exception of all international crimes.

The listing in the present legislation excludes a variety of international crimes for which I suggest that there should be presumptive extradition. The listing of such crimes is not advisable since it excludes some such as: war crimes, crimes against humanity and others, and would exclude others that may come about.

International crimes being those which an international convention states to be an international crime or those in which there is a specific obligation on the part of a state to either prosecute or extradite.

If I may here respond to a question that Mr. Sawyer had asked the preceding witness concerning the question of statute of limitation, there is since 1968 an International Convention on the Nonapplicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, and it would be appropriate for the United States to ratify that convention and thus avoid all of the problems relating to that question in the meantime a provision on that question could be inserted in this act.

Mr. SAWYER. Do I understand, you to say that we have not signed that?

Mr. BASSIOUNI. I don't believe so.

The act should also contain provisions concerning the defense of double jeopardy; plea bargaining, and statutes of limitations since those are questions that come out recurringly in various decisions.

They are sometimes treated in the treaties, but I think they are better treated in the national legislation.

Finally, I think we should have a provision here on transit extradition which involves a situation where somebody may be transitting over and through the United States and is being sent from one country to another, in which the United States is not involved, but may land in the United States and upon landing, may file a petition for habeas corpus.

I think, as a whole, I would like to conclude with one observation.

The act should be a truly national legislation. It should not be the exception to what the treaties do not cover. It should set the basic premises and fundamental rules and guidelines to which hopefully treaties will conform to.

I think it would prove very helpful to the Government in negotiating international treaties to be able to point to a comprehensive legislation that does not at each and every substantive procedural rule defer to a treaty.

By continuously deferring to a treaty, in fact, we are encouraging foreign governments negotiating with the United States to try to negotiate special rules.

If we did that, what we would have is not only a single national law, but as many national laws on extradition as we would have treaties with different countries.

We would have a separate jurisprudence for the different treaties adding more confusion, and certainly adding a great deal of work to the caseload of our already overburdened courts.

[The statement of Mr. Bassiouni follows:]

STATEMENT BY M. CHERIF BASSIOUNI

1. RELATIONSHIP BETWEEN THE LEGISLATION AND TREATIES

The importance of having a single national legislation providing uniformity in application cannot be underestimated. The Extradition Act should accomplish this purpose by serving as the basis for all substantive and procedural matters, while treaties, on the other hand, should include exceptional matters not covered in the legislation.

If the national legislation is not the general rule, then every treaty becomes a separate procedural statute, with the result that there could be as many as one hundred different procedures applied by the courts. The obvious consequence would be lack of consistency in the practice of extradition and potential jurisprudential confusion. Because precedents would only affect the interpretation of the provisions of each treaty individually, this would stimulate and increase judicial recourses with the result that the judicial case load would be significantly increased, especially at the appellate level, for a number of years to come. In addition to the obvious advantages of uniformity and reduction of litigation, a national legislation would also reduce the burden on the United States government of renegotiating with every foreign government basic substantive and procedural matters already contained in the Act.

Furthermore, the existence of national legislation, while it would not preclude the government from negotiating treaty provisions that may be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments in maintaining greater uniformity among treaties and conformity between the treaties and the legislation. The more the legislation in its specific language allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses which may differ from the legislation. Thus a true national legislation is what is suggested as it is the trend throughout the world as opposed to our Act which merely supplements treaties which would put the United States in a rather unique position among most countries of the world with a tradition in extradition law and practice. The same observation was made by this witness before the Senate Judiciary Committee on Bill 1639. *See* Hearings, Committee on the Judiciary, 97th Congress, 1st session, October 4, 1981.

2. RELIANCE ON MULTILATERAL TREATIES

Although the definition of "treaties" may be broad enough to encompass multilateral treaties, it is recommended that the definition specifically mention multilateral treaties. This would permit the United States to comply with those provisions in multilateral treaties to which it is a signatory and which allow reliance on the applicable extradition provisions in these treaties instead of or in addition to bilateral treaties.

Such provisions exist, for example, in the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, art. 36, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961, 8 August 1975, E/Conf. 63/9, 26 U.S.T. 1439, T.I.A.S. No. 8118, art. 36; Convention on Psychotropic Substances, 21 February 1971, U.N. Doc. E/Conf. 58/6, T.I.A.S. No. 9725, art. 22; Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 31 January 1971, OAD/Off. Rec./Serv. P./Doc. 68, 27 U.S.T. 3949, T.I.A.S. No. 8413, arts. 3, 7; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 14 December 1973, G.A. Res. A/3166 (XXVIII), 28 U.S.T. 1975, T.I.A.S. No. 8532, art. 8; Tokyo Convention of Offenses and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, art. 3; Hague Convention on the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, I.C.A.O. Doc. 8920, 22 U.S.T. 1641, T.I.A.S. No. 7192, art. 8; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 25 September 1971, I.C.A.O. Doc. 8966, 24 U.S.T. 564, T.I.A.S. No. 7570, art. 8. For a listing of international instruments on international criminal law and a bibliography of inter-

national crimes, see M. C. Bassiouni, "International Criminal Law: A Draft International Criminal Code" (1980).

3. MULTIPLE REQUESTS

The draft legislation contemplates that in the event a person is held non-extraditable, the Attorney General may not present a second request on the "same factual allegations." To conform more closely to the traditional definition of double jeopardy, it is suggested that the word "substantially" be added to "same factual allegations." This would give the government additional flexibility.

4. PROVISIONAL ARREST

Because provisional arrest subjects a person to detention without the opportunity for either the government or the relator to know much about the charges or the evidence available to support it, it is recommended that provisional arrest be structured to provide for a very short initial period of detention, (five working days) pending the arrival of "some evidence of probable cause." If this evidence is not produced, the individual should be entitled to release on bail in accordance with the provisions of the Bail Reform Act. This would reduce the individual's burden to meet the requirements of the bail provisions set forth in the Act which are more difficult to meet because he would not have the benefit of having knowledge of the charges or being confronted with the documents and evidence otherwise required by the Extradition Act. See *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

5. EXTRADITABLE OFFENSES AND DOUBLE CRIMINALITY

To avoid extradition for minor offenses, it is recommended that the provision on extraditable offenses and double criminality be drafted to require that extradition shall be allowed only if the crime in question is punishable by at least one year of imprisonment under the laws of the United States, the state of arrest, or the majority of states. This will avoid using the cumbersome process of extradition for minor offenses. Certainly it would also avoid the need to list extraditable offenses which requires periodic updating and causes problems of interpretation. See *Branch* v. *Raiche*, 618 F.2d 843 (1st Cir. 1980), which permitted reliance on the criminal laws of the majority of states.

6. WAIVER AND THE RULE OF SPECIALTY

Waiver of the extradition hearing should be linked to the rule of specialty; that is, the Act should provide that the relator can be prosecuted in the requesting state only for the crime for which he has waived the extradition hearing.

In addition, the Act should provide that a relator can consent to a waiver only after he has informed the court of his willingness to consent and has been advised by the court of the charges against him for which his extradition has been requested. These changes are required to ensure an individual's consent is made with full knowledge of the charges against him and to ensure that the court record reflects the charges for which the individual was extradited.

7. RULE OF SPECIALTY

A separate provision on the rule of specialty should be inserted in the Act. Although specialty may benefit the relator, it is also a right of the government, as the requested state having granted extradition, to ensure that its processes have not been used for a purpose other than the one specified in the treaty. This provision should permit the Government to waive the rule without the need for a judicial hearing provided that the requested state has "probable cause" for the other crime or crimes, and that it does not seek to prosecute the individual for political, racial, religious, or ethnic reasons. See M. C. Bassiouni, *International Extradition and World Public Order*, 352-60, 406-407 (1974).

8. PROBABLE CAUSE AND COURT'S FINDINGS

The Act should specifically designate the findings the court must make in determining whether an individual may be extradited. The Act should require that the court make the following findings:

(1) that the court has jurisdiction; and

(2) that a valid treaty exists on which extradition can be based; and

(3) that the complaint conforms with the provisions of the Act; and

(4) that there are reasonable grounds to believe that the person charged is the one before the court; and

(5) that the evidence presented is sufficient to support a finding of probable cause to believe that such person may have committed the offense charged; and

(6) that the offense charged is extraditable under the treaty and is punishable under the laws of the requesting state and under the laws of the United States or any other state within the United States of America; and

(7) that no defense to extradition specified in the applicable treaty or in this act exists.

In its present form, the draft omits some of the requirements set forth in numbers 1, 2, 3, 6 and 7 above. In addition the draft allows extradition on less that "probable cause" or none depending upon the applicable treaty.

The proposed changes listed above would spell out with certainty the documents and showings that are incumbent upon the government in accordance with existing treaty and legislative standards as well as a body of jurisprudence in the United States that has been consistent for almost one hundred years.

It must be noted that the Act states that "probable cause" is only required in the absence of treaty language contrary thereto. This means that the government may negotiate away the requirement of "probable cause." So far, the Supreme Court has not ruled on whether "probable cause" is a required constitutional standard for extradition. The absence of legislation would probably compel the Court to take such a position. In any event, "probable cause" is required for an arrest under the fourth amendment. Consequently, it is difficult to conceive how a person can be arrested with "probable cause" but can be extradited without "probable cause." The government could argue however that "probable cause" for an arrest is different from "probable cause" for extradition, thus creating an artificial distinction in legal standards which has not existed heretofore. Clearly this would increase opportunities for litigation while in the meantime ostensibly reduce the procedural guarantees that "probable cause" requires, which in this case is equivalent to the same constitutional guarantee. The legislation should not enhance the ambiguity inherent in its present form. Because of the importance of "probable cause" as a fourth amendment right, it is quite likely that courts would find that requirement to be a constitutional standard.

9. EVIDENTIARY MATTERS

The Act should be more specific with respect to the use of the federal rules of evidence to determine the "sufficiency of evidence" and "probable cause" to ensure that courts will not rely on state rules of evidence if the crime for which the relator is requested is predicated on state criminal law under the principle of double criminality.

The Act should also specify that any evidence seized in the United States in accordance with the rules of search and seizure and other constitutional guarantees may be transmitted to the requesting state.

10. RULE OF NON-INQUIRY

Two issues arise in connection with the rule of non-inquiry: first, whether the individual upon return will be subjected to cruel, inhuman or degrading treatment; second, whether the relator, although requested for an extraditable offense, was actually requested with the intention of being prosecuted on the grounds of race, religion or political beliefs as defined in the 1967 Protocol amending the 1951 Refugee Convention.

With respect to the first issue, United States courts should be permitted to deny extradition or to request assurances that a person shall not be subjected to cruel or unusual treatment in the requesting state. This has not been the case in the United States so far. See M. C. Bassiouni, *International Extradition and World Public Order* 424, 463, 466, 569 (1974). See also *Rosado* v. *Civilleti*, 621 F.2d 1179 (2nd Cir. 1980) (although not an extradition case, it indicated the reluctance of United States courts to inquire into the process of foreign countries.)

With respect to the second issue, the extradition judge should be permitted to apply the provisions of the 1980 Refugee Act concerning asylum if a finding is made according to the provisions of title 8, United States Code, section 1101(a) (42) (A) that the individual would be subjected to persecution in the requesting state on the grounds set forth in that section. At present, an immigration judge at an asylum proceeding may make such a finding; therefore, there is no reason why the extradition judge should not be able to make the same determination based on the same

legislation provisions. Any different provisions would create inconsistencies, which should be avoided.

11. POLITICAL OFFENSE EXCEPTION

The Act should require that a person otherwise found extraditable shall not be extradited if the court finds that extradition is sought for a political offense, or for an offense of a political character. A political offense or an offense of a political character should be defined as either (1) a purely political offense such as an offense based on acts or conduct not involving violence and directed against the state, or essentially constituting freedom of speech, opinion, expression, and their symbolic manifestations not involving violence; or (2) a relative political offense whereby a person who is politically motivated engages in a political act in the context of a war, revolution, civil strife, civil or political disturbance and in which a crime of violence has resulted as a natural outgrowth of the predominating political act. The relative political offense should also, therefore, be included. In contrast to a purely political offense which has no element of common crime, a relative political offense contains an element of violence which creates a private wrong. The relative political offense can be an extension of the purely political offense, or it can be a common crime prompted by ideological motives.

In determining whether an act constitutes a relative political offense, three factors should be taken into account: (1) the degree of the actor's political involvement in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause on behalf of which he has acted, and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed above) and the crime committed; (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal, or objective to be served; and (4) that the relator's political motives and goals predominate over his intention to commit the common crime. See *Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981). These criteria are the embodiment of the jurisprudence of the United States on the political offense exception and are elaborated in greater detail in M. C. Bassiouni, *International Extradition and World Public Order*, 370–425 (1974).

In addition, the Act should state that an international crime as specified in a multilateral treaty to which the United States or the requesting state is a party shall not constitute a political offense or an offense of a political character and is excluded from the applicability of the political offense exception.

In the formulation of the specific provision on exclusion of international crimes, rather than listing those international crimes which are excluded—which would preclude non-listed crimes—it is suggested that the provision specifically state: "any offenses which an international treaty to which the United States or the requesting state is a signatory which specifically states that the conduct in question constitutes an 'international crime,' or any offense which an international treaty to which the United States is a signatory which provides for the alternative of prosecution or extradition."

This formulation would include a number of international crimes not encompassed by the present formulation of the Act such as war crimes and crimes against humanity, slavery and slave-related crimes; genocide and apartheid (although the United States has not yet ratified these two conventions); unlawful use of the mails for acts of terrorism; international traffic in obscene materials; and interference with international cables. See M. C. Bassiouni, *International Criminal Law: A Draft International Criminal Code*, 52–106 (1980). In addition, this formulation would include such other international crimes as may be developed by future international conventions such as the "Draft Convention on the Prevention and Suppression of Torture," 1 February 1978, U.N. Doc. E/CN. 4/NGO 213, which is presently before the United Nations.

The Act should also specify that the relator may petition the court to suspend the extradition proceedings or the extradition order pending a determination by the Attorney General or the Secretary of State of the relator's petition for political asylum in accordance with the provisions of title 8, United States Code, section 1101(a)(42)(A), if one is pending. This instance would apply whenever a person has been arrested and for extradition after he has filed a petition for political asylum. In that case, the extradition proceedings would be suspended pending a determination by the Attorney General and the Secretary of State in accordance with the Immigration and Naturalization Act. In the event, however, that the individual raises an issue substantively analogous to the grounds for political asylum within the con-

text of the extradition hearing, the recommendation made under number 10, Rule of non-inquiry would apply.

12. DOUBLE JEOPARDY AND IMMUNITY AND PLEA BARGAIN

The Act should include a provision stating that a person shall not be extraditable if he has already been prosecuted, whether acquitted or convicted, for substantially the same crime or offense as the one for which his extradition is sought. The Act should also provide that such a determination shall be made on the basis of United States law or the law of the state wherein the court is located. In this manner, the legislation will codify judicial interpretation holding that the defense of double jeopardy is validly raised as a bar to extradition when the extradition request is based on the same or substantially the same crime as that for which the relator has been convicted or acquitted. Whether the legal basis of this defense in United States law is found in the eighth amendment or the doctrine of res judicata, it embodies the principle *ne bis in idem* recognized in various multilateral and bilateral treaties to which the United States is a signatory. See *Sindona* v. *Grant*, 619 F.2d 167 (2nd Cir. 1980). This would also provide for uniformity among treaties.

In addition, the Act should include a provision stating that if immunity or plea bargain includes or refers to extradition, a person who is sought for extradition and who has been granted immunity from prosecution in the United States for substantially the same crime or substantially the same facts giving rise to the offense for which he is requested will not be extradited unless any prosecution or conviction in the United States predicated on the immunity or plea bargain is vacated. Such a provision would take into account current United States case law holding that a relator cannot be extradited if he was granted immunity or entered a negotiated guilty plea with respect to conduct which is the same or substantially the same as the one giving rise to the criminal charge for which extradition is sought. Because constitutional rights supersede obligations under a treaty, extradition in such an instance cannot be granted unless the plea is vacated. See *Santobello* v. *New York*, 404 U.S. 257 (1971); *United States* v. *Pihakis*, 545 F.2d 973 (5th Cir. 1977); *Scrivens* v. *Henderson*, 525 F.2d 1263 (5th Cir.), cert. denied 429 U.S. 919 (1976), *Geisser* v. *United States*, 513 F.2d 862 (5th Cir. 1975), on remand *Petition of Geisser*, 414 F. Supp. 49 (S.D. Fla. 1976), vacated on other grounds, 554 F.2d 698 (5th Cir. 1977); *Dugan* v. *United States*, 521 F.2d 231 (5th Cir. 1973). *See also* the testimony of M. C. Bassiouni before the Senate Judiciary Committee on Bill 1639, 97th Congress, 1st session, October 14, 1981.

13. TRANSIT EXTRADITION

The Act should include a provision permitting the government to petition any federal district court for a transit extradition order permitting federal agents or the agents of a foreign state to detain a person during transit through the United States from one foreign state to another foreign state pursuant to a valid extradition order. The practice of granting such orders is followed in other states such as in Western Europe, where extradition from one state to another may necessitate transit through another state. Without such an order the individual in custody can claim that his detention in the United States, even though transitory is unlawful, and by petition a writ of Habeas Corpus challenge his detention. *See* testimony of M. C. Bassiouni, Hearings on Senate Bill 1639, Committee on the Judiciary, 97th Congress, 1st session, October 14, 1981.

Mr. HUGHES. Thank you, Professor.

Professor, as I understand your testimony, you would change the rule of noninquiry and basically permit courts to take up a number of issues, including what type of treatment an individual would receive to in fact return to a demanding jurisdiction.

My question is, What would that do to the whole concept of separation of powers for one thing, and the right, particularly of the executive branch of the Government, to negotiate treaties between countries, including extradition treaties.

It would seem to me if in fact a country had so deteriorated in the treatment of individuals and the importance it attaches to human rights, then it should be incumbent upon this country to look at those treaty obligations. Either renegotiate or bail out or

take that into consideration if we are in fact negotiating a treaty for the first time, as one of the factors in determining whether or not we want to enter into such a treaty with that country.

Wouldn't we be undercutting, really, the authority of the executive to make those important decisions on a country-to-country basis if in fact it permitted courts to look beyond the initial offering of a country requesting extradition?

Mr. BASSIOUNI. I realize this is a very ticklish question, but the executive would be in a much more difficult position to have to make representations to a foreign government about its treatment of prisoners than would the judiciary. The judiciary is much more neutral and removed. The executive would find the political ramifications of having to abrogate an extradition treaty or bringing something to the attention of a foreign government might have political repercussions that might be very serious, which the executive may not want to do. The judiciary is much more removed and can do that in a much more detached manner.

The basic problem is whether or not the judiciary of one country can sit in judgment on the judicial system or the penal system of another country. That issue was faced with respect to the legislation concerning the execution of foreign penal sanctions in transfer of prisoners and it was very clear in that legislation, and in the whole scheme of transfer of prisoners, that the U.S. judiciary would not sit in judgment over the penal system of another country. That is because in that legislation the policy thrust was to make sure that we would bring American prisoners from overseas into U.S. prisons and if the quid pro quo was not to look into the way a penal system functioned, this was balanced. I don't think that same policy consideration exists in extradition.

Let me take the simple example of assuming—and I am not trying to cast any disparaging remarks on a country's system. But let me assume that a U.S. citizen is working in a given country that applied Islamic law strictly, in the course of working there he stole a loaf of bread then he came back to the United States and that country asked for his extradition. That country would apply the sanction of cutting off his hand for the theft of the loaf of bread. Query: Would a U.S. court have the right to inquire into the type of treatment that would affect such a person?

I submit that there are instances in which a U.S. court should be permitted, by legislation, where gross violation of cruel and unusual punishment are involved, to inquire into the prospective treatment and refuse extradition. The individual could then be prosecuted in the United States as I indicated above.

Mr. HUGHES. It seems to me, however, the responses in negotiating a treaty with Pakistan, or any other country that has a system such as you have just described with penalties we feel are disproportionate to the crime, whether, during the negotiating process, that isn't a fact which should be considered by the executive and by the Senate in order to approve those treaties. And in fact if changes take place after we have entered into a treaty, then isn't the proper course of action for this country to renegotiate that treaty, withdraw, make modifications of it, whatever is necessary to fulfill what we consider to be our intent vis-a-vis that country.

Mr. BASSIOUNI. I am not that hopeful about the flexibility that the State Department has in being able to renegotiate these treaties and act as fast as may be needed. Prior experience indicates that treaties, especially with countries with which we may not have very close ties or good relations, move slowly.

I suppose that the way out of such a problem would be by the Secretary of State using executive discretion, and I think this is probably the easy way out. But by using executive discretion, it is a judgment by the U.S. Government on the activity behavior or conduct of a foreign government and it has many more political implications than if a Federal district court judge decides the matter. It depoliticizes the decision and insulates the U.S. Government from its consequences.

Mr. HUGHES. Mr. Sawyer.

Mr. SAWYER. No questions.

Mr. HUGHES. Mr. Hall.

Mr. HALL. I have no questions.

Mr. HUGHES. Thank you, Professor. You have been most helpful to us.

Our next witness is Prof. Steven Lubet of Northwestern University in Illinois. Professor Lubet is a full professor in the law school and teaches courses on the law of international travel and transnational criminal law. Professor Lubet has written extensively on the subject of extradition, and has advised the Israeli Government in extradition cases.

Professor Lubet, we have received a copy of your written statement, and without objection it will become a part of the record. Please proceed as you see fit.

TESTIMONY OF STEVEN LUBET, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Mr. LUBET. Thank you very much, Mr. Chairman and members of the subcommittee. I also appreciate the opportunity of appearing here today. My testimony is generally supportive of House bill 5227, which in my view is a commendable and admirable effort to bring some greater order to a relatively chaotic area of the law. Particularly, the additional definition and specificity that is found in H.R. 5227 is extraordinarily helpful.

My remarks will principally concentrate upon the application or the treatment of the political offense exception in House bill 5227. I will discuss the judicial role in the application of the political offense exception, the definition found in the bill and the question of the burden of proof with regard to the exception, which is not treated in House bill 5227.

Also, before I begin I would like to tell Mr. Sawyer that I have been to Keokuk, Iowa. It is a lovely place, and I commend it to you if you should like to drop by there sometime. Keokuk was an Indian chief who came originally from Illinois, and he has held a special place in my heart for many years.

Mr. SAWYER. I feel the same way about Grand Rapids, Michigan, which is well-known.

Mr. HUGHES. I might say I feel the same way about New Jersey, and Mr. Hall feels the same way about Texas, to make the record clear.

Mr. LUBET. Section 3194(a) of House bill 5227 preserves the judicial role in the application of the political offense exception. This is in contrast to the Senate bill which would eliminate that role entirely and place the decision solely in the hands of the Secretary of State. In my view it is of great importance that the role of the judiciary be maintained in applying the political offense exception.

Although there is no right to a judicial decision on the point, the decision to extradite an individual is nonetheless one which concerns individual liberty. It is a decision of tremendous consequence and in our system of justice it is traditional, axiomatic, perhaps the first principle, that decisions of this sort are to be made through the process of public hearing and impartial decisionmaking in an impartial forum.

That doesn't mean that I doubt the fairness of the executive branch or doubt the ability of the executive branch to render a fair or impartial decision concerning the political offense exception. What I do wish to suggest is that the public appearance of fairness is much greater when that decision is made in a court and is subject to appeal and review. The appearance of fairness is often as important as the question of fairness itself.

The appearance of fairness is particularly important with regard to the political offense exception because these are cases which draw international attention. The *Mackin* and *McMullen* cases, which the subcommittee discussed earlier, are certainly in the newspapers throughout the British Commonwealth. The *Abu Eain* case has been on the front pages of Israeli newspapers and newspapers throughout the Islamic and Arabic world. It is the U.S. best interest in controversial cases like these that the world understand that in our system of justice individual defendants are given every opportunity to establish their defense, and that decisions are not made without rationale or reason.

I would call this the judicial shield. That is, by giving the initial decision to the judiciary we shield the executive branch of our Government from the international fallout that can occur both when decisions are made not to extradite and when decisions are made in favor of extradition.

An example might be found in the *McMullen* case. In my view the *McMullen* case was correctly decided. Under at least the prevailing concepts of American law, the offense charged was a political one. It is not inconceivable that a Secretary of State would come to the same conclusion. If the Secretary of State were to come to that conclusion and inform Great Britain "I'm sorry, the executive branch of our Government has decided you cannot have Mr. McMullen back," that would certainly cause greater disruption in our relations than if the decision could be blamed on a judge or the judicial system.

Let me suggest, also that the same result obtains when decisions are made in favor of extradition. The example of the *Abu Eain* case is one point. The decision to extradite Abu Eain was not a popular one. It was condemned by the General Assembly of the United

Nations, and it was protested by the ambassadors of many Arabic countries.

Despite the international criticism, however, it must be obvious from the lengthy judicial proceeding that Mr. Abu Eain had every opportunity to put forward his defense. There can be no question that the judicial procedures employed in ordering his extradition to Israel were thorough, open, fair, and complete. Thus, the nature of the process defuses criticism and, in that sense, the judicial process provides a shield to the executive even when the decision is to extradite the offender to the other country.

By allowing the judicial branch to make this decision, the decision to extradite or not to extradite is validated for all the world to see. I believe that we should not abandon this system in favor of executive decisionmaking. Furthermore, the problem of nonreviewability is completely remedied in House bill 5227 by the provision for direct appeal. With that revision there should be no objection to allowing the decision to remain with the judiciary.

I do believe, however, that the judiciary ought to be given the benefit of some clearer definition of the law that is supposed to apply. There is no current statutory or international treaty definition of a political offense. House bill 5227 is admirable in its effort to give some meaning to that term, to provide a standard that the courts can apply.

It is my view, however, that the standard found in the act is too restrictive. I share the opinion of Mr. Goodman when he pointed out that traditionally some crimes of violence under some circumstances have been found to be political offenses, and have been considered within the realm or applicability of the political offense exception. H.R. 5227 goes too far, in my opinion, in restricting that application.

Certainly it is appropriate to frame a definition which will exclude acts of individual terrorism, crimes against civilians, and crimes against internationally protected persons from the definition of a political offense, but I think the broad ranging exclusion of all violent activity in H.R. 5227 goes too far.

Let me just give an example. We have an extradition treaty with Poland. If Lech Walesa were to escape from his confinement tomorrow and in the process should injure, wound, shoot at or kill a guard, surely we wouldn't want to eliminate that crime from the protection of the political offense exception. Violence may be essential to escape from confinement in a totalitarian country.

I think that the definition of "political offense" ought to be broadened or, conversely, that the exclusions ought to be narrowed. Rather than focusing upon the use of violence, the focus should be on the victims of the violence or the nature of the specific act. In fact, one subsection of H.R. 5227 already provides as much by excluding crimes against internationally protected persons and diplomatic personnel from the definition of a political offense. I think that form of exclusion is much more useful than the broader exclusion of all violence. At a minimum, however, even if the Congress were to decide to keep this exclusion for all crimes of violence, I think the statute ought to make it clear that that exclusion is intended only to apply to the courts and not to the executive branch. This will preserve the executive flexibility to review extradition

even for crimes involving violence. That is, we might want to say this is too tricky an area to entrust it to an evidentiary hearing in a courtroom, so a violent crime cannot be considered a political offense by the courts. Violent crimes would all be certified to the Secretary of State, but the Secretary, in his discretion could still refuse extradition for a crime which involved a violent act. That may be the intention of the bill as drafted, but I think it is ambiguous on that score.

Finally, I would like to move to the question of burdens of proof. House bill 5227 is silent with regard to this question. It doesn't say who has to prove whether or not the offense was political. Does the requesting country have to prove it wasn't political? Does the defendant have to prove that it was? The bill offers no guidance and the case law is silent.

There are American cases which say it is the defendant's burden to prove that the offense was political. There are also American cases that say it is the Government's burden basically to prove the offense was not political. Although the recent trend is in favor of placing the burden on the defendant, there is no certainty that that trend will continue. I think that the statute should make it explicit that the burden of proof in the political offense area is placed upon the defendant.

This should be done for a variety of reasons. The first is that it is simply an affirmative defense: the defendant is seeking to prove something new, something beyond the four corners of the request. Affirmative defenses are classically the burden of the defendant to prove.

Second, the information that would establish the political nature of an offense is uniquely within the control of the defendant. It was Mr. McMullen who knew that he belonged to the Irish Republican Army. He had control of that information. The Government should not have been placed in the position of having to prove that he didn't belong to the Irish Republican Army. That would be virtually impossible to prove. Proof of a negative is widely seen as overwhelmingly difficult, if not impossible. We shouldn't place that burden on the Government in the area of international extradition.

From a policy point of view I think it is reasonable to say, particularly in cases involving violence, that the presumption should be against the political offense exception. We should presume that acts of violence are not political and borderline cases should be resolved in favor of extradition. Unless the defendant can clearly establish that his act of violence falls within the exception, he ought to be extradited. In fact, it would be my suggestion that the legislation go even beyond the sort of traditional standard of proof, which is preponderance of the evidence, and establish a burden of clear and convincing evidence.

I suggest this because the preponderance of the evidence standard is one which is relative or comparative: you look at the two parties' evidence, you weigh it and see which is stronger. That makes sense when you have an amount of money and you have to decide who gets it and see who makes the better case. But when you are discussing possible terrorism, the use of violence, and international extradition, I think it is far more appropriate that an objective standard be applied. That is, require the defendant to prove

his case by objectively satisfactory evidence. The Government doesn't have to say anything, but the defendant must prove by objectively satisfactory evidence that the crime falls within the exception. He must make a clear and convincing case in order to prevail on the point.

I think that is the appropriate burden, and it also accomplishes the goal of preserving executive flexibility. If we presume extraditability, that will bring more cases to the attention of the Secretary of State. This will give the executive branch, not the courts, the opportunity to make the ultimate decision in the truly close cases.

Thank you again for this opportunity.

[The statement of Mr. Lubet follows:]

TESTIMONY OF PROF. STEVEN LUBET

Mr. Chairman and Members of the Committee: Thank you very much for the opportunity to testify today with regard to House Bill 5227.

My name is Steven Lubet; I am a Professor of Law at Northwestern University in Chicago. Among other courses, I teach a seminar at Northwestern entitled "The Law of International Travel," which covers the subject of international extradition. I have recently authored an article on the subject of international extradition entitled "The Role of the American Judiciary in the Extradition of Political Terrorists," and I am presently at work on another article which is likely to be entitled "The Political Offense Exception in International Extradition: The Case for Judicial Review."

All observers of the recent extradition cases in the United States must surely agree that the time has come for a comprehensive revision of American extradition law. The current statutory framework contains numerous deficiencies, most notably a consistent lack of definitions and procedural guidelines. These deficiencies have been recognized by the drafters of House Bill 5227, and Senate Bill 1639, and both bills represent laudable attempts to correct a difficult situation.

As my academic work has centered upon the application of the political offense exception in cases of international extradition, I shall limit my comments to several issues within this area. With your permission, I shall discuss the following matters:

The definition of a political offense which is found in section 3194 of House Bill 5227;

The question of the judicial role in determining the applicability of the political offense exception; and finally,

Certain issues of procedure which are raised by the process of extradition.

THE DEFINITION OF A POLITICAL OFFENSE

As the Committee knows, the political offense exception may be found in virtually every modern treaty of extradition, and appears in each of the ninety-three bi-lateral extradition treaties to which the United States is a party. Although the language of the exception differs from treaty to treaty, it characteristically provides that there shall be no extradition for crimes of a political nature. The language found in most treaties does little or nothing to answer the obvious question which is raised by the existence of the exception, that is, what constitutes a crime or offense of a political nature? Thus, from our point of view, the definition of the term "political offense" has been left to the municipal or domestic law of the United States.

The current extradition statute is silent as to the definition of the term "political offense." Although numerous courts have attempted to give meaning to the term, no satisfactory definition has emerged. It is generally agreed that political offenses may be analytically divided into two broad catagories, the pure political offense and the relative political offense, but beyond this point the consensus breaks down. The pure political offenses are those such as treason, sedition, and espionage which are aimed directly at the organs of government. These crimes are easily recognizable and easily defined. Not surprisingly, they are also seldom the subject of extradition requests, since these offenses are understood never to be extraditable. Rather, most requests for extradition allege the commission of a common crime, and this is where the substantial definitional problems arise. A "relative political offense" is one which comprises the elements of a common crime but which is so closely related to political activity that its political nature warrants protection from extradition. This description necessarily calls for line-drawing and the question of just what common

crimes may be considered "relatively political" has been the subject of much judicial and academic debate. By attempting to answer this question within a statutory framework, House Bill 5227 promises to resolve a long-standing question.

In attempting to frame a definition for the political offenses exception, it is important to bear in mind the purpose for which the exception has come into existence. The concept of political asylum is a humane one which originated in the age of enlightenment. The political offense exception itself is the embodiment of the notion that political dissenters or rebels ought not be turned over for trial and punishment to the very government which they have opposed. This concept is now well accepted in customary international law, and indeed, may be found in the Universal Declaration of Human Rights adopted by the United Nations. It is in keeping with the very purpose of the political offense exception that its definition be a flexible one, which may encompass and protect a broad range of legitimate political dissent. A broad definition, of course, need not be a mechanistic or all-inclusive one. The word "political" may have different meanings in different contexts, and the United States is under no legal or moral obligation to shelter a fugitive from extradition simply because he claims a political motive for his crime.

The philosophic concept of a broad exemption from extradition for political offenders is sharply challenged by the phenomenon of modern terrorism. The nobility of the theory must necessarily pale when we realize that it has been invoked on behalf of men like Abu Daoud, the mastermind of the massacre at the Munich olympics. Thus, any legislative definition of the term "political offense" should combine breadth sufficient to protect legitimate dissidents with stringency sufficient to exclude those whose chosen form of "political" expression is to engage in wanton violence.

The level of flexibility is precisely what the traditional American judicial approach lacks, largely because the American courts have persisted in applying the out-dated "incidence test" to cases involving relative political offenses. That test, which was first enunicated in 1891 in the British case *In Re Castioni*, 1 Q.B. 149 (1891), provides basically that a crime is not subject to extradition if it was committed in furtherance of a political disturbance or rising. This emphasis on the existence of a rising or rebellion has resulted in a test which is both under-inclusive and over-inclusive. The traditional test is under-inclusive in that it appears to exclude from protection offenses of individual dissent which were not part of a general rising or rebellion. The over-inclusive aspect of the test is that it lays the framework for the claim that all offenses committed in the course of a rebellion or rising, without regard to the character of the crime, should be insulated from extradition. In fact, it was precisely this reliance on the existence of a political disturbance which prompted the magistrate in the recent *Mackin* case to take extensive evidence on political conditions in Northern Ireland and to uphold Desmond Mackin's claim that the wounding of a British soldier was a relative political offense.

The obvious shortcoming of the *Castioni* test is its focus on political context, rather than on the specific nature of the crime. This approach led a federal magistrate in a recent case to conclude that acts of violence committed during a political disturbance must warrant asylum "[e]ven though the offense be deplorable and heinous." Such a test actually seems geared toward the protection of terrorists. There is simply no justifiable reason for the United States to shelter those who commit "heinous and deplorable" crimes, even in the name of politics. It is therefore my opinion that we should abandon the *Castioni* test in favor of an approach which focuses on the nature and impact of an offense, rather than its political environment.

House Bill 5227, as it is now written, contains an admirable first attempt at framing a definition which will provide asylum for a broad range of political dissidents, but which will exclude terrorists who claim to operate under a mantle of political legitimacy. The definition provided in section 3194 of the Bill is, however, unnecessarily vague, and in my opinion, far too restrictive. The vagueness of the definition lies in the use of the word "normally." Section 3194(E)(2)(a) provides that a political offense "normally includes" sedition, treason, or unlawful political activity. Similarly, section 3194(E)(2)(b) provides that a political offense "normally does not include" certain defined acts. This elasticity of definition is both confusing and unnecessary. If nothing else, the inclusion of the word "normally" is certain to give rise to protracted litigation over the question of whether cases are normal or abnormal, not to mention the question of what significance is to be attached to abnormality. Since Bill 5227 is obviously aimed otherwise at streamlining the extradition process, it is anomalous indeed that it should include a term which virtually begs for a lengthy process of judicial interpretation. Furthermore, since the thrust of the definition is significantly to cut back on the applicability of the political offense exception, little is to be gained by the injection into the judicial process of such an elastic term. Ab-

normal circumstances might warrant departure from a stated definition, but under accepted principles of international law the Secretary of State will always have the discretion to consider abnormal conditions before ordering extradition.

A more serious deficiency in the proposed definition is its substantial limitation on the availability of the defense. The definition appropriately recognizes and includes the pure political offenses of sedition, treason, and unlawful political advocacy, but it goes on to exclude virtually all of the relative political offenses. The definition accomplishes this by excluding virtually any purportedly political offense which involves violence. Thus, section 3194(E)(2)(d) provides, in part, that a political offense normally does not include an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage or serious unlawful detention, or an offense involving the use of a firearm. These are precisely the sort of offenses to which, under certain circumstances, the relative political offense doctrine is generally agreed to apply. Accordingly, the definition found in the statute represents a substantial departure from prior law and interpretation.

In light of certain recent extradition cases, this approach is definitely appealing. Without question, the proferred definition will exclude from the ambit of the political offense exception virtually all acts of terrorism. It also has the definite benefit of ease of application. With the creation of a rule which excludes all crimes of violence from the political offense exception, it will become possible to apply the exception based upon nothing more than a simple examination of the charge. It will become virtually unnecessary for any court to hold a hearing on the political offense exception, since it will virtually never apply to any situation which also involves the charge of a common crime. Thus, for example, the *Abu Eain*, *McMullen*, and *Mackin* cases, all of which ultimately involved lengthy evidentiary hearings, could each have been decided without trial based upon an application of the proposed rule. Abu Eain was charged with placing a bomb which killed two children, Mackin has been charged with shooting a British policeman, and McMullen was charged with the bombing of an army barracks in which a charwoman was killed. In each of these cases the charged offense falls well beyond the scope of the definition contained in section 3194. Consequently, none of these three defendants could have claimed the protection of the political offense exception, and indeed, no hearings would have been necessary to determine the inapplicability of the defense.

The problem with this exclusion of all violent offenses is that it sweeps far too broadly and promises to deny the protection of the political offense exception to those whom we might wish, and indeed ought, to protect. There can be no question but that the political offense exception has always been intended to apply to at least some persons sought for violent acts committed in the course of rebellion or revolution. In fact, if there were two world events which could be said to have given rise to the concept of asylum from extradition, they were the French Revolution and our own War of Independence. We may not now wish to extend this protection to factions such as the Red Brigades of Italy, but we should not fashion a definition which also serves to exclude rebels such as the anti-Soviet partisans currently fighting in Afghanistan.

A far better approach to the definitional problem would be to focus upon the type and nature of violent activity charged, rather than upon the simple fact that violence or use of a firearm was involved. Section 3194(E)(2)(b)(iii) of the proposed act actually accomplishes this by excluding serious offenses involving an attack against the life, physical integrity or the liberty of internationally protected persons, that is to say, civilians. The subsection by itself accomplishes the goal of excluding terrorists from the protection of the political offense exception. It succinctly incorporates the existing notion of law that acts aimed against civilians, rather than at the installations of government, may not be termed political.

If further definition is deemed preferable, an additional subsection could be added which excludes from the notion of a political offense acts which are intended to, or have the effect of, creating fear, terror, or disruption among the civilian populace, or which have the principal effect of disrupting the social order. Such a definition would unquestionably exclude terrorist activities such as the bombing of public places, kidnapping, and other acts of social disruption. The courts would maintain, however, the ability to extend the protection of the exception to those whom we might wish to call legitimate rebels or actual contenders in a national struggle for power.

There is one possible interpretation of section 3194 which avoids some of the difficulties that I have just outlined. Section 3194 may be read to provide only that the courts' jurisdiction to consider the political offense exception shall be limited to the pure political offenses. The exclusions found in section 3194(E)(2)(b) could be read as a limitation on the judiciary's ability to pass upon the existence of a relative politi-

cal offense, while reserving that option to the Secretary of State. That is, the exclusion of violent acts from the definition of a political offense may be read so as to apply only to the courts, and not to the executive branch.

The result here would be to foreclose the courts from taking evidence and ruling upon the existence of a relative political offense. The courts would still be given the task of deciding the easier question of whether a pure political offense was implicated, but would not be in the position of having to determine the existence of a relative political offense. This task would be left to the superior resources, and perhaps to the superior judgment ability, of the State Department. In a certain sense this approach may be seen to represent a compromise between those who seek to preserve the judicial role and those who wish to eliminate it entirely.

I do not favor this approach since it would have the practical result of giving the Secretary of State sole discretion over the only really contested issues. May I suggest, however, that if this is the intention of the drafters it should be made explicit in the Act. Section 3194, if adopted, will constitute the only legislative definition of the term 'political offense.' In the absence of explicit language to the contrary, it is obviously possible, if not likely, that the executive will accept this definition as binding. Thus, the executive may adopt the restrictive view of a political offense which is contained in Section 3194, and consider itself bound by the language of the Act to refuse consideration of relative political offenses. For this reason, may I suggest at a minimum that language be added to the statute which provides, in effect, that nothing in the statute shall be read or taken to limit the discretion of the Secretary of State to deny a request for extradition on the ground that the offense involved was of a political character.

JUDICIAL ROLE

This discussion, of course, implicitly raises the question of the judicial role in considering the political offense exception. This is not an uncontroversial issue. As the committee knows, Senate Bill 1629 would eliminate entirely the judicial role in making this determination, and commend the decision solely to the discretion of the Secretary of State. This view, I assume, has both theoretical and practical underpinnings. The theoretical foundation is based upon the concept that application of the political offense exception is essentially a political decision. Because application of the exception necessarily involves an examination and evaluation of political conditions in other sovereign countries, it is inextricably linked with the conduct of American foreign affairs.

This, of course, is an area which is generally left to the discretion of the executive. Furthermore, it must be noted as a practical matter that the courtroom is an extraordinary cumbersome forum in which to determine facts which lie close to opinion concerning the internal affairs of other countries. There can be no doubt but that the executive branch has greater resources and greater abilities both to determine and to evaluate these facts. The impetus which these two arguments provide toward instituting a purely executive mode of decisionmaking is no doubt bolstered by the popularly perceived dissatisfaction with recent judicial applications of the political offense exception.

In the recent *McMullen* case, a federal magistrate in San Francisco applied the political offense exception to an admitted Irish Republican Army gunman whom Great Britian sought to extradite. Mr. McMullen was charged with, and indeed admitted, placing a bomb in a British Army barracks which subsequently exploded, destroying the barracks and killing a charwoman. The federal magistrate ruled that the defendant's association with the Irish Republican Army, together with the nature of his target, an army installation, rendered the crime one which was of a political nature. In an even more attenuated situation, a federal magistrate in New York City applied the exception to deny Great Britain's request to extradite Desmond Mackin, who was also alleged to be an I.R.A. gunman. Mackin was charged with shooting and wounding a British soldier on patrol in Northern Ireland. The defendant, while denying the shooting, argued that his affiliation with the Irish Republican Army was sufficient to make the confrontation one of a political nature. The magistrate agreed, and denied the request for extradition. These two decisions have been widely criticized, both in this country and in Great Britain, and they are perceived to have strained, if not damaged, our traditionally friendly relations with Her Majesty's government. It has been suggested that decisions such as those in the *McMullen* and *Mackin* cases hamper our government's conduct of foreign policy and interfere with our own afforts to combat terrorism. It is argued, therefore, that such delicate decisions involving international politics ought to be left to the political branch, that is, the State Department.

This argument, result oriented as it is, certainly has its attractions. It is incumbent upon the legislature, however, not to allow hard cases to make bad law. Our judicial system has administered the application of the political offense exception since the last century with no demonstrably injurious effect upon the conduct of our foreign policy. Whatever problems have been created by the *McMullen* and *Mackin* decisions may be readily remedied through procedural reform within the judicial system, and do not call for complete institutional change.

The argument for the preservation of a judicial role is strong. Although in one sense it might be said that the political offense exception is purely a matter of governmental grace, the concept has become so wide-spread and so well accepted as to have become something more than simply an optional provision to be found in bilateral treaties. The concept of political asylum is included in the United Nations Declaration of Human Rights and may also be found in numerous multilateral treaties and conventions. In fact, the principle that a nation should not deliver a political offender to a government against which he has taken up arms is so universally held that we may now commonly speak of a right of political asylum. Thus, the political offense exception is a concept which at least touches upon or concerns the international protection of human rights.

It surely need not be said that our system of justice is largely based upon the idea that questions of individual rights, and particularly those rights involving physical liberty, are to be resolved in a neutral judicial forum. This approach is not mandated by any of our ninety-three treaties of extradition and is not required, to my knowledge, by any international convention to which the United States is a party. Nonetheless, it has been nearly universal among countries which follow the common law to commend these decisions to the judicial system. Judicial decision making provides for a public hearing which is attended by all of the trappings of fairness and completeness which our democratic government values and insures. The court may provide an environment which is insulated from expediency and which is, at least in theory, dedicated to only to the determination of truth and the protection of individual rights. Such a forum is appropriate given the magnitude of the decision which is being made and the rights which are in question.

It may also be the case that the determination of the political offense exception by a neutral and judicial forum actually diminishes the possibility of embarrassment to the government in the conduct of foreign affairs. It is true that a policy of executive decisionmaking will allow the government to take whatever course it chooses and thus avoid the problem of executive inability to deliver up a fugitive despite the government's desire to do so. It is equally true, however, that a principled application of the political offense exception might require the executive to refuse to extradite an individual despite the government's desire to maintain cooperative relations with the requesting country. The *McMullen* case comes close to providing such an example. McMullen's crime was clearly directed against an installation of the British army. I do not wish to express an opinion as to the correctness or incorrectness of the magistrate's conclusion in that case, however, it is obvious that under some set of circumstances some members of the Irish Republican Army might well commit an offense against the British which could only be deemed political. In such a case, it might well be more advantageous to the conduct of our foreign policy to have the decision against extradition stem from the judiciary rather than directly from the executive. The use of the judicial branch as the initial decision maker may actually serve as a shield for the executive to avoid confrontation with friendly governments over matters of international extradition. Thus, the maintenance of the judicial role, while serving a definite philosophic function, may also have a practical advantage.

JUDICIAL REFORMS

In my view, the essential goal of extradition reform is to remedy the defects in our current judicial process, rather than to eliminate the process itself. As I read House Bill 5227, this is the task which that piece of legislation attempts. May I suggest that of the three principal problems with our current judicial process, House Bill 5227, addresses and attempts to solve two, but inexplicably ignores the third completely.

The first judicial shortcoming is the non-reviewability of the magistrate's decision. From at least 1893 until the present it has been widely, if not uniformly, understood that the government may not appeal from an adverse finding by a court of extradition. Although this conclusion is currently being challenged by the Justice Department, which has attempted an appeal in the *Mackin* case, the court of appeals has not yet ruled on that issue and it remains the consensus view that a judicial deci-

sion against extradition is not appealable. This problem surely explains a great deal of the dissatisfaction with the *Mackin* and *McMullen* opinions. It is simply unacceptable that a federal magistrate, the lowest official in the judicial hierarchy, should be able to make a decision of international import without any possibility of review. The argument for judicial decision making, as I have previously noted, is a strong one; but there is absolutely no argument to be made in favor of non-reviewable judicial decision making.

The current state of affairs, at least until the Second Circuit rules on the *Mackin* appeal, does cause intolerable difficulty for the government in the conduct of foreign affairs. This problem is, however, completely remedied by House Bill 5227 which unequivocably provides that a decision either in favor of or against extradition may be directly appealed. This change in the law will absolutely end the situation which allows a low ranking judicial officer to thwart the wishes of the executive branch. I am close to certain that the *McMullen* and *Mackin* decisions would be seen as far more acceptable had they been issued from a three judge appellate panel rather than from a single magistrate. Indeed, the provision for appealability which is added by the current bill allows for the possibility of review en banc by the entire bench of a circuit court of appeals and even for review by the United States Supreme Court. This provision, it goes without saying, greatly reduces, if not eradicates, the possibility of legal or factual error.

The second judicial difficulty which is recognized and to some extent dealt with by House Bill 5227 is the problem of judicial fact-finding in the arena of international political events. In the *Mackin* case, for example, the magistrate engaged in a broad ranging evidentiary hearing on the history and current nature of the conflict in Northern Ireland. Because of the very nature of the judicial process, her ability to conduct this inquiry was limited to the taking of testimony in a courtroom thousands of miles removed from the scene of events. Under such circumstances it is understandable that subtleties and nuances will be lost and that the decision will be viewed as one which depends upon the reception and evaluation of discrete facts, to the exclusion of political judgment. These difficulties are reflected in the magistrate's one hundred page opinion which, although certainly diligent and conscientious, presents what can at best be called a problematic picture of Irish history and politics. In short, the magistrate's attempt to apply the judicial mode of fact-finding to a situation which called more for historical and political judgment could not produce a satisfactory result. House Bill 5227 resolves this problem by eliminating the troublesome "incidence" test from judicial consideration. By eliminating the need to ground the entire decision upon the domestic political situation in the requesting country, the House Bill also largely eliminates the need for the sort of hearing which the magistrate held in the *Mackin* case. Thus, House Bill 5227 allows the trier of fact to focus on the nature of the alleged act and offense, rather than solely upon its political background. Of course, political background cannot be ignored when evaluating the applicability of the relative political offense, but House Bill 5227 appears significantly to reduce the need, scope and ultimate intrusiveness of this inquiry.

PROCEDURE AND BURDEN OF PROOF

The final area of judicial difficulty, that of procedure, is completely ignored by House Bill 5227. The proposed statute contains neither rules nor directives which govern the manner in which the political offense exception may be raised or the standard under which it is to be determined. While section 3194(d) sets out the government's burden of proof concerning the facts of the underlying crime, the bill never answers the same question concerning the political offense exception. Must the defendant prove, by whatever standard, that his act was a political one, or must the requesting country prove that it was not? Previous cases have not provided a consistent answer to this inquiry, and House Bill 5227 provides no additional guidance to either the courts or the Secretary of State.

The question of burden of proof, although strictly speaking a procedural one, is of the utmost importance in this area because it may often be outcome determinative. If the burden of proof is placed upon the government, the situation could well arise where a requesting country will be unable to establish the non-political nature of a crime, simply due to the physical difficulties involved in presenting evidence in an extradition case. Conversely, if the burden is placed upon the defendant, he will be compelled to produce evidence showing the link between his alleged action and a political offense. In the absence of any prior statutory pronouncements on this issue, different courts have reached different conclusions as to where this burden lies. In *Ramos* v. *Diaz*, 179 F. supp. 459 (S. D. Fla. 1959), the trial court judge addressed the

question of relative burdens and concluded that "when evidence offered before the court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove to the contrary." On the other hand, the court in the *Abu Eain* case essentially held that the burden of proving the applicability of the political offense exception rests always upon the defendant. Unless this issue is resolved by Congress, it seems likely that confusion concerning the question of burden of proof will continue to exist in both the judicial and executive branches. If for no other reason than uniformity and predictability of decision it is necessary that House Bill 5227 address this problem.

It is my opinion that, for reasons of both policy and practicality, the burden of proof in political offense cases ought to rest upon the defendant. The policy reasons for thus placing the burden stem from both political and judicial considerations. On the political side, it may be recognized that our government's policy has been, and ought to be, to extend asylum only where it is clearly warranted. Borderline cases, particularly those involving violence, should be resolved at the judicial level in favor of extradition and against the defendant. This may be seen as a presumption against the assertion of the defense. Such an assumption is warranted by the very nature of the extradition process, since every case will involve a treaty which has been signed by the President and approved by the Senate, not to mention an explicit decision by the Department of Justice to pursue the specific request for extradition. Thus, at least some measure of good faith in bringing the request for extradition ought to be presumed. Accordingly, the defendant who claims that both the requesting country and the United States Department of Justice are seeking to have him extradited on a nonextraditable offense, ought reasonably to bear the burden of establishing his claim before the finder of fact. This approach has the additional benefit of preserving executive flexibility, since it insures that in truly close cases the courts will not bar extradition, but will rather certify the matter for consideration by the Secretary of State.

As a matter of judicial policy, the political offense exception should be viewed in the same manner as an affirmative defense. The party pleading the exception has put forward an affirmative claim which seeks to avoid the consequence of an otherwise valid extradition request. Since this matter is new to the proceeding, affirmative in nature, and comes from beyond the four corners of the requisition for extradition, it is a reasonable judicial conclusion that the party who raises the matter must also be the one to establish it.

This result is mandated by practical considerations as well. The applicability of the political offense exception will often, if not always, rest at least in part upon an evaluation of the goals, affiliations, activities, and principles of the defendants, since only a politically motivated actor may claim the protection of the political offense exception.

This information is obviously within the sole control of the defendant. Only the defendant may produce evidence of his political motivation and, conversely, it will be virtually impossible for the requesting country to produce evidence that a defendant was apolitical. The placement of the burden upon the requesting country would call, in essence, for the proof of a negative. Such a task in other contexts is universally seen as overwhelmingly difficult, if not impossible.

The practical difficulty involved in such a situation is amply illustrated by an example drawn from the *Abu Eain* case. It was Abu Eain's claim that once he provided evidence which "tended to show" that the crimes with which he was charged were political, the burden of proof should then be shifted to the requesting country to prove by a preponderance of the evidence that the offenses were not political. Following this construction he claimed that he had met his burden by showing that bombings directed at Israeli civilians were "typical and common" undertakings of the Palestine Liberation Organization. Although Abu Eain himself did not testify, and did not otherwise offer any evidence concerning the specific motivations behind the specific bombings, he went on to claim on the basis of their "typicality" that the burden fell upon the government to disprove their political nature. The government, of course, had no ability to provide such proof of motivation, beyond a description of the crime itself. Indeed, it is virtually impossible to conceive of the form that such proof might take. How could the government of Israel or the United States prove that certain crimes were not secretly political? Obviously, if such a burden were to be placed on the government simply because the defendant in an extradition case had claimed the protection of the political offense exception, the process of extradition would grind to a standstill.

Although neither the magistrate nor the Court of Appeals accepted Abu Eain's formulation of the burden of proof, it must be recognized that his argument was soundly based on the holding in *Ramos* v. *Diaz*. In the absence of a clear directive

from Congress, there can be no guarantee that future defendants will not succeed in similar efforts to place the burden of proof upon the government.

One final point regarding burdens of proof. It is generally assumed that the burden of proof concerning the political offense exception is the "preponderance of the evidence" standard. That is, it has been agreed that the inquiry ought to be whether it is more likely than not that the offense was political. May I suggest, however, that it may be more appropriate to place an even higher burden of proof upon the party asserting the defense. Given the nature of modern political terrorism, and given the United States' firm resolve not to act as a haven for terrorists, it may well be preferable to require that a defendant prove by clear and convincing evidence that he is entitled to the protection of the political offense exception. The difference between the two standards is that one is subjective, depending upon the relative weight of the evidence produced by the parties, and the other is objective, as it is judged in relationship to the real world. Under the preponderance of the evidence standard, the judge is asked to evaluate the evidence put forward by both sides and to decide which is stronger. This approach is suitable for the trial of civil lawsuits, because the only question there is which party is more entitled to prevail in a claim for damages. In an extradition proceeding, however, the question of the applicability of the political offense exception should not be resolved merely by consideration of which party was able to marshall the more persuasive evidence. Rather, the sanctuary of the exception should not be offered to a defendant unless the decider of fact is objectively convinced of the correctness of that course of action. This goal may be accomplished simply by requiring that the defendant's proof by "politicalness" be clear and convincing in and of itself.

CONCLUSION

In conclusion, it is my opinion that the current draft of House Bill 5227 is a sound and commendable attempt at resolving the current issues in American extradition jurisprudence. It is my view that the definition of a political offense which is contained in the Bill should be broadened to include what are generally termed relative political offenses, or alternatively, that consideration of the relative political offenses be given explicitly to the Secretary of State. The principal advantage of House Bill 5227 over Senate Bill 1639 is that the House Bill maintains the judicial role in the determination of the political offense exception. In doing so, the bill nonetheless manages to remedy many of the perceived difficulties with recent judicial decisions by seeking to define the meaning of "political offense" and by including a provision for appealability. The bill would be even stronger in this regard if it were explicitly to place upon the defendant the burden of proving the applicability of the political offense exception by clear and convincing evidence.

Thank you very much for allowing me to appear before you and to express my views today.

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THE ROLE OF THE AMERICAN JUDICIARY IN THE EXTRADITION OF POLITICAL TERRORISTS

STEVEN LUBET* AND MORRIS COHEN**

INTRODUCTION

On August 21, 1979, Ziyad Abu Eain was arrested in Chicago and informed that the government of Israel was seeking his extradition on the charge of murder. The charges resulted from an Israeli police investigation which linked him to a bombing in a crowded market area in Tiberias, Israel, which killed two children.[1] Abu Eain asserted that he was not extraditable because of the political offense exception that exists in the extradition treaty between the United States and Israel.[2] He claimed that Israel sought his extradition because of his past association with the Palestine Liberation Organization and that in any event, the bombing was a political act aimed at the State of Israel. Following a lengthy hearing, a federal magistrate in Chicago found that probable cause existed to extradite Abu Eain and that the charged offenses did not fall under the political offense exemption.[3]

Six months earlier Peter Gabriel John McMullen successfully raised the same defense when Great Britain sought his extradition from the United States[4] for involvement in the 1974 bombing of a British Army installation in England by the Provisional Irish Republican Army.[5] The federal magistrate concluded that this bombing was part of a political disturbance and was directed at the British army--a prime target for guerilla warfare.[6]

These cases illustrate a highly intricate extradition jurisprudence. The political offense exemption is found in virtually every modern treaty of extradition and its application calls for findings of fact and conclusions of law concerning crimes, events, and political situations halfway around the world. In *Abu Eain*, for example, the magistrate declined to take judicial notice "that there is now, and has existed for more than three decades, a military and political conflict between the government of Israel and the several Arab states and the people of Palestine."[7] In *McMullen*, however, the magistrate did take notice that "a insurrection and a disruptive uprising of a political nature" existed in Northern Ireland in 1974.[8]

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[1] The bombing occurred on May 14, 1979. Tiberias is a resort area on the Sea of Galilee. The area was unusually crowded with young people who were participating in a youth rally and holiday vacationers who had traveled to the city for the feast of Lag B'Omer. The blast, which was centered along one of the city's main thoroughfares, killed two youngsters instantly. Thirty-two others required hospitalization and still others were treated for minor injuries. N. Y. Times, May 15, 1979, at 3, col. 5.

[2] The Convention on Extradition between the United States and Israel in relevant part provides:

> Extradition shall not be granted in any of the following circumstances: ...
> 4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Dec. 10, 1962, art. VI, 14 U.S.T. 1707, T.I.A.S. No. 5476 (effective Dec. 5, 1963).

[3] *In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.). There is no provision for direct appeal from orders of a federal magistrate in extradition proceedings. The United States District Court for the Northern District of Illinois denied a petition for a writ of habeas corpus on March 28, 1980. No. 79 C 5477 (N.D. Ill. March 28, 1980) (mem.). Abu Eain has appealed this denial to the Seventh Circuit. No. 80-1487.

[4] The Extradition Treaty between the United States and Great Britain provides in part:

> A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Dec. 22, 1931, art. VI, 47 Stat., pt. 2, 2122, T.S. No. 849 (effective Aug. 4, 1932).

[5] Evidence presented in the proceeding established Mr. McMullen's membership in the Provisional Irish Republican Army at the time of the bombing. The political objective of the PIRA is nationalization of Northern Ireland. In 1974, the PIRA's terrorist activities created heightened tension in England and Northern Ireland. The British government responded by outlawing the Irish Republican Army and conferring upon police unprecedented power to fight terrorist activities. N.Y. Times, Nov. 30, 1974, at 4, col. 3.

[6] *In re* McMullen, No. 3-78-1099 MG, mem. at 5 (N.D. Cal. May 11, 1979).

[7] *In re* Abu Eain, No. 79 M 175, mem. at 12-13.

[8] *In re* McMullen, No. 3-78-1099 MG, mem. at 4.

In an area that concerns American foreign policy as deeply as does extradition, it is imperative that the judiciary develop a uniform approach to the application of the political offense exemption. Although there is a significant body of American case law that seeks to substantively define the term "political offence" the courts have paid considerably less attention to the procedural requisites of the defense. This article explores the American judiciary's procedural and substantive role in extradition proceedings as a framework for developing an approach to the political offense exemption within the fundamental principles of individual liberty and human rights.

Extradition of Political Offenders

Extradition originally served as a device for surrendering political dissidents and as a means by which medieval rulers attempted to secure their political structure.[5] Often political offenders were extradited in the absence of any treaty.[6] As various forms of constitutional government supplanted monarchies, however, political dissent increasingly gained acceptability and the use of extradition as a political tool diminished in importance.[7] The political offense exception first emerged in the extradition treaty between Belgium and France in 1834.[8] Philosophical concepts generated by the French revolution[9] encouraged political participation and political change and legitimized resistance to tyrannical rule. Granting asylum to political offenders was therefore conceived as a duty in "almost all cases."[10]

The heightened concern for individual liberty, political dissent, and human rights in the world has led recently to various international enactments.[11] International concern perhaps peaked with the adoption of the Universal Declaration of Human Rights by the United Nations in 1948. The framers of the Declaration sought to promote uninhibited political debate by providing that foreign nations grant asylum to those accused of political acts.[12]

The political offense exception is not limited to nonviolent dissent; revolutionary or counterrevolutionary violence may also be protected from extradition. While this view might, from time to time, lead to distasteful results, it is clear that revolution falls within the ambit of political activity.

Certain acts of violence, however, existing at the fringe of legitimate revolution, challenge the conscionability of protecting such activities from extradition and punishment. It is the objective of the political offense exception to protect those violent

[5] Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 Marq. L. Rev. 777 (1977).

[6] Deere, *Political Offense in the Law and Practice of Extradition*, 27 Am. J. Int'l L. 247 (1933).

[7] *Id.* at 248.

[8] *See* Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. Pitt. L. Rev. 371, 372 (1953). One of the first countries to provide specific domestic legislation exempting political offenders from extradition was Belgium in 1833. The first treaty exempting the political offense from extradition appeared in the treaty between France and Belgium in 1834. I. A. Shearer, Extradition in International Law 16 (1971).

[9] Another reason provided by the authors of the 1933 Harvard Draft Convention on Extradition included the growing sense of interdependence between nations brought on by the Industrial Revolution and the appearance of a variety of modes of transportation which made escape from one country to another relatively easy. 29 Am. J. Int'l L. 1, 108 (1935); *see also* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L. J. 71, 71-73 (1978).

[10] Deere, *supra* note 10, at 249.

[11] *See* Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; International Covenant on Economic, Social, Cultural, Civil, and Political Rights; G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A16316 (1966); International Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (registered June 6, 1960); Convention on Political Rights of Women, March 31, 1953, 193 U.N.T.S. 135 (registered July 7, 1954); Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926, Dec. 7, 1953, 182 U.N.T.S. 51; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (registered April 22, 1954); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (registered Jan. 12, 1951).

[12] The Universal Declaration of Human Rights, U.N. GAOR, 217A, U.N. Doc. A1810 (1948) provides: "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." It should be noted that while voting members of the General Assembly unanimously approved the Declaration, eight states abstained: Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., U.S.S.R. Union of South Africa, and Yugoslavia. The Soviet Union did sign *A Convention for the Prevention and Punishment of Terrorism* in 1937 at Geneva. This resolution was never passed. Apparently Soviet policy, at least prior to the Afghanistan invasion, rejects international terrorism as a political offense. *See* Gold, *Non-extradition for Political Offenses: The Communist Perspective*, 11 Harv. Int'l L. J. 191, 202 (1970).

acts which are necessary and corollary to political activity, not to sanction gratuitous assaults on human life. Acts of international terrorism directed at civilians,[17] whether undertaken by governments, quasi-governments, or liberation movements, pose serious threats to world order and stability. Considering the vulnerability of the world community to destructive use of scientific and technological advancement, the ultimate impact of terrorist activity is yet unknown. Nevertheless, terrorists, armed with incendiary, chemical, biological, or even nuclear weapons presently might be capable of maiming or killing hundreds or thousands in a single attack without regard to the status or identity of their victims.[18] Such activities threaten basic human rights as surely as does government repression of dissent.[19] Furthermore, actions aimed at disrupting various vital services might result in more anarchy than change of government.[20]

Commentators have thus challenged on both a philosophic and practical level the view that international terrorist activities, whether undertaken by governments or individuals, fall within the same purview of traditional human rights as either dissent or revolution.[21] One author in the field has offered the following distinction:

> Although rebellion cannot be separated from conflict, violence directed against innocent parties is destructive not only of law and legal systems, but of civilized society. It is true that revolution and rebellion are recognized remedies in customary international law. The difference between legality and illegality, however is that violence directed against governments and governmental officials is not an international crime (except for an attack upon a head of state) whereas terror, violence directed against internationally protected personnel and noncombatant third parties, is a criminal act. Terrorist activity on the international level is basically a political maneuver designed to disrupt personal freedom and impair fundamental human rights. In this sense, international terrorism represents abominable means utilized for contemptible ends.[22]

Expressing similar concerns in its administration of the ninety-three extradition treaties now in force,[23] the United States has strictly construed

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[17] Terrorism may be defined in a number of ways depending upon the extent and nature of the activities undertaken. *See* Lowry, *Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW. 49, 66 (1977); Tran-Tam, *Crimes of Terrorism and International Criminal Law*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW 490 (M. Bassiouni ed. 1973). For purposes of this article, however, the essential elements of international terrorism are: (1) the involvement of citizenry of two or more countries or of acts occurring in one country committed by nationals of another country; (2) the involvement of a violent criminal act; and (3) the aim of creating overwhelming fear for politically coercive purposes within a country. R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 3-4 (1979).

[18] *See* Jenkins & Rubin, *New Vulnerabilities and the Acquisition of New Weapons by Non-government Groups* in EVANS & MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM 221 (1978).

[19] The Universal Declaration of Human Rights, U.N. Doc. A/1811, while seeking to guarantee political dissent, also seeks to guarantee a social and international order which provides that everyone shall have the right to life, liberty, and security of the person. *See also* Paust, *Nonprotected Persons or Things* in EVANS & MURPHY, *supra* note 18, at 334.

[20] *See* Jenkins & Rubin, *supra* note 18. The authors discuss the impact of terrorist activities on such modern systems as water, transportation, energy, communication, and computerized management and information systems.

[21] *See* M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1975) [hereinafter cited as TERRORISM]; M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974) [hereinafter cited as EXTRADITION]; A. CAMUS, RESISTANCE, REBELLION AND DEATH (1963); EVANS & MURPHY, *supra* note 18; R. FRIEDLANDER, *supra* note 17.

[22] R. FRIEDLANDER, *supra* note 17, at 44.

[23] *See* 18 U.S.C. § 3181 (Supp. II 1978) (Appendix C). The United States has entered into bilateral extradition treaties with the following nations:

Albania	Greece
Argentina	Guatemala
Australia	Guyana
Austria	Haiti
Bahamas	Honduras
Barbados	Hungary
Belgium	Iceland
Bolivia	India
Brazil	Iraq
Bulgaria	Ireland
Burma	Israel
Canada	Italy
Chile	Jamaica
Columbia	Japan
Congo	Kenya
Costa Rica	Latvia
Cuba	Lesotho
Cyprus	Liberia
Czechoslovakia	Liechtenstein
Denmark	Lithuania
Dominican Republic	Luxembourg
Ecuador	Malawi
Egypt	Malaysia
El Salvador	Malta
Estonia	Mauritius
Fiji	Mexico
Finland	Monaco
France	Nauru
Gambia	Netherlands
Fed. Repub. Germany	New Zealand
Ghana	Nicaragua
Grenada	Nigeria

these laws when terrorist activities are involved. Former Secretary of State Cyrus Vance, for example, has stated on the floor of the Senate that the United States seeks to apprehend, bring to trial, and penalize international terrorists.[24]

The policy of providing asylum for dissidents without becoming a haven for terrorists is easier to state than to implement.[25] All terrorists, and certainly all invoking the political offense exemption, claim the mantle of political justification. Courts have found drawing a line of demarcation between protected political activity and criminal terror to be quite difficult.

Neither Congress nor the Supreme Court has defined the term "political offense."[26] Consequently, the lower courts are left to decide the issue on a case by case basis. Although the courts have paid considerable attention to the substantive law, they have not developed a coherent procedural approach to the political offense exemption.

Norway	Surinam
Pakistan	Swaziland
Panama	Sweden
Papua New Guinea	Switzerland
Paraguay	Tanzania
Peru	Thailand
Poland	Tonga
Portugal	Trinidad and Tobago
Romania	Turkey
San Marino	United Kingdom
Sierra Leone	Uruguay
Singapore	Venezuela
South Africa	Yugoslavia
Spain	Zambia
Sri Lanka	

[24] I think the president and the administration has made it very clear that we do not condone or accept terrorism in any way, that we oppose all of its aspects, and we will do everything we can to see that those who are involved in it are apprehended and are brought to trial and penalized for their action.

An Act to Combat International Terrorism: Hearings on S. 2236 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 30 (Jan. 23, 1978) (statement of Secretary of State Cyrus Vance).

[25] In the trial of Ziyad Abu Eain, Louis Fields, a member of the Office of the Legal Advisor of the Department of State testified that "[i]t is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent, is a prohibited act, and as such is a common crime of murder, punishable in both states." *In re* Abu Eain, No. 79 M 175, mem. at 17 (quoting record at 1041). The State Department also submitted the following statement of policy, signed by Mr. Keene E. Malmberg, the Assistant Legal Advisor directly responsible for international extradition matters:

> Murder and causing serious bodily harm are patently not political offenses but common crimes. I understand that the accused asserts that the bombing (in Tiberias on May 14, 1979) was politically motivated. Based upon my examination of the evidence and the official definition of terrorism, I have concluded that, whatever the motivation, planting and exploding a bomb with intent and result of killing and wounding civilians indiscriminately is not an offense of a political character but an act of terrorism, pure and simple. It is the view of the Department of State that Article VI, paragraph 4, of the treaty is not applicable to acts of terrorism.

Record at 945. Similarly, the view presented by the United States to the United Nations Ad Hoc Committee on International Terrorism was that violence against civilians falls beyond the scope of legitimate political activity:

> The subject of international terrorism has, as the Secretary-General has already emphasized, nothing to do with the question of when the use of force is legitimate in international life. On that question, the provisions of the Charter, general international law, and the declarations and resolutions of the United Nations organs, in particular those of the General Assembly relating to national liberation movements, are not and cannot be affected. But even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which must not be used: the legitimacy of a cause does not in itself legitimize the use of certain forms of violence, especially against the innocent. This has long been recognized even in the customary law of war.

U.N. Doc. A/C 6/418 (1979).

[26] In Karadzole v. Artukovic, 355 U.S. 393 (1958), *rev'g per curiam*, 247 F.2d 198 (9th Cir. 1957), the most well known recent Supreme Court opinion on political extradition, the Court simply remanded the case to the district court without commenting on the definition of a political offense.

The Extradition Process in the United States

Extradition of a fugitive may be based upon comity or reciprocity, or upon a treaty obligation.[27] In certain extreme cases, a country might use abduction, kidnapping, or some informal procedure to obtain jurisdiction over an individual.[28] Although the extent of the United States' obligations to grant an extradition request absent a treaty was

[27] Extradition based solely upon comity or reciprocity often has been resorted to by a number of foreign nations. *See generally* Evans, *Legal Bases of Extradition*, 16 N.Y.L.F. 325, 330 (1970).

[28] The kidnapping of Adolf Eichmann is a prime example of such irregular seizures. Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 277 (1962). In certain instances, deportation of an individual may result in de facto extradition. *See* O'Higgins, "*Disguised Extradition*": *The Sobire Case*, 27 Mod. L. Rev. 521 (1964); *see also* M. Bassiouni, Extradition, *supra* note 21, at 121-201.

the subject of much debate in the nineteenth century,[26] it is now generally well established that the United States will honor an extradition request only pursuant to its treaty obligations.[27] Furthermore, Congress has required implementation of certain safeguards before returning an individual to the requesting country.[28]

Extradition is a criminal proceeding[29] which the authorized representative of a requesting country may initiate[30] by filing a verified complaint with the nearest court having jurisdiction over the individual.[31] A judicial officer then may issue a warrant for the individual's arrest and further detention if the complaint satisfies all requirements.[32] Once the individual is in custody, the presiding judicial officer may set or deny bail.[33]

The requesting nation may supplement this procedure by filing a requisition with the Secretary of State asking that the accused be returned in accordance with the terms of the existing treaty. The requesting nation may file the requisition either prior to or during the judicial proceedings. If filed prior to the judicial proceedings, the Secretary of State may issue a preliminary mandate to the proper judicial officer on behalf of the foreign government. The mandate usually includes a copy of the verified complaint as well as other supporting documentation. The judicial officer then issues a warrant as if the foreign country had itself filed the complaint.[34]

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[26] *See generally* Evans, *supra* note 22.

[27] Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Rauscher, 119 U.S. 407 (1886); *see also* Evans, *supra* note 22, at 528 (citing 1 MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 23 (1891)), where Professor Evans notes, the *Arguilles* case is the only known case where the United States granted extradition in the absence of a treaty. Arguilles was actively involved in slave trading and was turned over to the Spanish government by Executive Order in 1864 as an act of comity.

[28] 18 U.S.C. § 3184 (1976) provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

[29] Grin v. Shine, 187 U.S. 181 (1902); Rice v. Ames, 180 U.S. 371 (1901); First National City Bank of New York v. Aristequieta, 287 F.2d 219 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963).

[30] Although the representative often will be a consul or diplomatic officer, it is only necessary that the person filing the complaint have authorization from the requesting country. *See* United States *ex rel.* Caputo v. Kelly, 92 F.2d 605, *cert. denied*, 303 U.S. 635 (1938).

[31] A careful reading of 18 U.S.C. § 3184 reveals that jurisdiction over the extradition proceedings is vested in judicial persons and not in any court. The theory underlying this delegation of power assumes that extradition is not a judicial function, but rather one reposed in the Department of State. Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932). However, it is generally agreed that in the first instance, extradition is a matter of judicial competence. *See* Jimenez v. Aristequieta, 290 F.2d 108, 108 (1961) where Judge Brown, in his concurrence, stated:

> Repeated often in the cases is the loose generality that the extradition hearing is not a judicial proceeding. It may not be when measured by the usual indicia of a formal judgment of commitment, appeal, and the like. But the very essence of 18 U.S.C.A. § 3184 is a reflection of the fundamental concept among civilized nations that there shall be a non-partisan, unbiased, objective hearing by a judicial officer acting solely because of his judicial position—and hence training and discipline—to determine whether there is a sufficient basis to sustain the charge under the treaty.

[32] The authorized representative may file the complaint upon an information or belief that is properly sworn and attested. Ordinarily the complaint should include the name of the individual sought; the nature of the extradition treaty between the United States and the requesting country; sufficient information to show that the crime charged is an offense under the treaty and under both the laws of the area where the complaint is filed and the laws of the requesting country; a certified copy of the indictments or conviction of the individual sought by the requesting country by competent authorities showing the offense charged; accompanying affidavits, documents and other pertinent evidence proving the foreign law and the facts alleged. M. BASSIOUNI, EXTRADITION, *supra* note 23, at 514. *See also* Note, *United States Extradition Procedure*, 16 N.Y.L.F. 420 (1970).

[33] *In re* Gannon, 27 F.2d 362 (E.D. Pa. 1928). Bail need not be set because procedures for release on bail are purely statutory and are not provided for in 18 U.S.C. § 3184.

[34] *See* note 33 *supra*.

The role of the court of extradition is ultimately to determine whether there is sufficient evidence in support of the request.[39] The requesting country bears the burden of establishing probable cause to believe that the accused committed the charged offense.[40] To reach the issue of probable cause, the court must make three additional findings. First, the extradition treaty must be in effect and applicable to the case.[41] Second, the person named in the complaint must be the same individual who is before the magistrate or extraditing judge.[42] Finally, the "rule of dual criminality" requires that the acts charged constitute a criminal offense in both the requesting country and the forum state.[43] This decision-making process, which has been recognized either implicitly or explicitly by most courts of extradition,[44] does not specifically contemplate a political offense defense. The defense, however, is clearly invocable as either a challenge to the applicability of the treaty or to the criminality of the acts charged. In either case, it remains unresolved which party bears the burden of producing evidence on this issue and which bears the ultimate burden of proof.

The Supreme Court has analogized the extradition hearing to a preliminary hearing in a criminal case.[45] Because the hearing is not a plenary proceeding involving the actual guilt or innocence of the accused,[46] the judicial officer may afford the requesting country wide latitude in producing evidence to establish the commission of the offense and probable cause. The evidence may consist of hearsay in the form of affidavits, depositions, or other pertinent documentation. The requesting country need not produce witnesses.[47]

Evidence admissible on behalf of the accused is restricted, again on the theory that the proceeding is preliminary.[48] The extraditee has a limited right to present, and even subpoena,[49] witnesses material to his defense. However, the court only will permit the defendant to introduce evidence which is offered either to show that he is not the actual person being sought by the requesting country,[50] or to explain the circumstances of the offense.[51] The defendant may not present any other evidence in defense of the charge, such as an alibi, because it would have no bearing on whether the requesting country has established a prima facie case.[52] The

[39] Peroff v. Hylton, 542 F.2d 1267, 1269 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *see also* Benson v. McMahon, 127 U.S. 457, 460 (1888).

[40] Charlton v. Henkel, 221 U.S. 508, 512 (1911); Peroff v. Hylton, 542 F.2d at 1269; United States v. Artukovic, 170 F. Supp. 383, 388 (1959).

[41] *See* Ivancevic v. Artukovic, 211 F.2d 565, (9th Cir.), *cert. denied*, 348 U.S. 818 (1954). *See also* Note, *supra* note 37, at 444.

[42] Ivancevic v. Artukovic, 211 F.2d 565.

[43] Factor v. Laubenheimer, 290 U.S. 276 (1933).

[44] *See* M. Bassiouni, Extradition, *supra* note 21, at 515-24, and cases cited therein.

[45] Charlton v. Kelly, 229 U.S. 447 (1913); Benson v. McMahon, 127 U.S. 457.

[46] Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

[47] 18 U.S.C. § 3190 (1976) provides:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunal of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

[48] Charlton v. Kelly, 229 U.S. at 461-62.

[49] 18 U.S.C. § 3191 (1976) provides:

> On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpoenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpoenaed in behalf of the United States.

[50] 6 M. Whiteman, Digest of International Law, 998-99 (1968).

[51] Collins v. Loisel, 259 U.S. 309, 315-16 (1977); Charlton v. Kelly, 229 U.S. at 462. *Cf.* Sindona v. Grant, 461 F. Supp. 199, 204 (S.D.N.Y. 1978); Application of D'Amico, 185 F. Supp. 925, 929-30 (S.D.N.Y. 1960).

[52] Collins v. Loisel, 259 U.S. at 315-16; Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1974). In *Collins* the Supreme Court noted that to allow the accused to present exculpatory evidence:

> would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning

Evidence is limited.

accused, however, may offer evidence of the political nature of the crime, to show that the offense is not extraditable under the treaty. Evidence of the crime's political nature is admissible exclusively to explain the circumstances of the crime. It is not admissible, for example, in aid of a defense of justification or necessity.[47] The decision as to the admissibility of evidence lies within the sound discretion of the extraditing judge, and it is not reversible unless it negates the purposes of the hearing.[48]

Review of the magistrate's decision within the judicial system is limited. Although upon an adverse ruling, the requesting country may refile its request,[49] the particular ruling terminates the proceeding and is not thereafter subject to direct appeal to a higher court. This restriction reflects the theory that, because a judicial officer administering the hearing does not sit as a member of any court, his decision is not a final order open for direct appeal. However, the accused may collaterally attack the decision by filing a petition for a writ of habeas corpus.[50] The only issues generally reviewable in these proceedings are those relating to jurisdiction, the existence, application, or interpretation of the treaty, and the identity of the individual appearing at the hearing.[51]

If the courts ultimately authorize extradition, the Department of State must independently decide whether to deliver the accused to the requesting government.[52] The Secretary of State will not consider the request until the completion of all judicial proceedings.[53] Further action by the Secretary will be foreclosed if the court holds that an extraditable offense did not occur within the meaning of the treaty. If the courts find the accused extraditable, the secretary has broad discretion to deny extradition if conditions so warrant. Generally, the Department of State conducts a de novo examination of the issues and court proceedings and bases its decision on the available record.[54] The Secretary, however, may consider matters outside the record such as competing requests from different countries, a time lapse barring prosecution, or public policy in light of current international relations.[55] Thus, the courts often defer consideration of whether an individual is being sought for political reasons to the Department of State.[56]

In addition to reviewing matters beyond the record, the Secretary may differ from the committing magistrate on the weight or sufficiency of the evidence.[57] Such a disparate reading of the record occurred when the Russian government requested the extradition of Krishian Rudewitz in 1908 on charges of murder and arson. A committing magistrate held that the offenses were not political and thus certified extradition. After his own careful review of the record, however, the Secretary of State denied the request because he determined that the charges were the result of activities undertaken by the accused as a member of the Social Democratic Labor Party.[58]

Despite this broad discretion, the Secretary has in fact seldom overruled a court decision in favor of extradition.[59] This apparent deference to the

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of the extradition treaties.

259 U.S. at 316 (quoting *In re* Wadge, 15 F. 864, 866 (S.D.N.Y.), *aff'd*, 16 F. 332 (1883)).

[47] 6 M. WHITEMAN, *supra* note 49, at 999-1001. Evidence concerning the motives of the requesting government or the procedures which await the accused upon his return to the requesting country are irrelevant to the judicial officer's determination and hence inadmissible. Peroff v. Hylton, 542 F.2d at 1298; Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965); Sindona v. Grant, 461 F. Supp. at 204.

[48] *See* Collins v. Loisel, 259 U.S. 309; Merino v. United States Marshall, 326 F.2d 5 (9th Cir.), *cert. denied*, 337 U.S. 907 (1963).

[49] *See* 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 367-70 (1973).

[50] 28 U.S.C. § 2241 (1970).

[51] Fernandez v. Phillips, 268 U.S. 311 (1925); Garcia-Guillern v. United States, 450 F.2d 1189.

[52] 18 U.S.C. § 3186 (1970) provides:

> The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

[53] 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 334 (1941) (citing a memorandum from counselor Anderson of the Department of State to Secretary of State Knox, February 1912, Department of State File 211.42/69[10]).

[54] *See* Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962); *see also* 4 G. HACKWORTH, *supra* note 53, at § 334.

[55] *See* 4 G. HACKWORTH, *supra* note 53, at § 334.

[56] Garcia-Guillern v. United States, 450 F.2d 1189; *In re* Lincoln, 228 F. 79 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *In re* Locatelli, 468 F. Supp. 558 (S.D.N.Y. 1979); *In re* Gonzalez, 217 F. Supp. 217 (S.D.N.Y. 1963).

[57] *See* 4 G. HACKWORTH, *supra* note 53, at § 334.

[58] *Id.*

[59] *See generally* Note, *supra* note 54.

courts reflects a political sensitivity to international affairs. Judicial determination of extradition issues permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States has failed in the enforcement of its treaty obligations.

Thus, the role of the judicial officer in the extradition process, although theoretically preliminary to that of the State Department, might well be determinative of the entire proceeding and might effectively preempt the Executive Branch in the conduct of American foreign policy. From a practical perspective, the danger of vesting this decision-making in the judiciary is that a judicial officer hearing the case might lack the expertise to determine the political or nonpolitical nature of an offense arising in an intricate international fact situation. This danger is especially acute with respect to cases involving terrorists because of the complex and ambiguous interplay between their avowed goals and actual conduct.

Development of the Substantive Law

The question of what constitutes a political offense has been the subject of international scholarly debate, diplomatic discussion, and judicial opinion.[60] Certain international agreements to which the United States is a party prohibit the signatories from treating slavery,[61] genocide,[62] and aircraft hijacking[63] as political offenses.[64] Several European bilateral extradition treaties provide that acts against heads of state and diplomatic personnel are nonpolitical.[65] Several more recent treaties provide that offenses aimed at transportation or communication networks are extraditable.[71] Others have gone even further and include offenses against domestic laws relating to firearms, explosives, or incendiary devices.[72] Finally, certain treaties provide that any drug offense is extraditable.[73]

Political offenses historically have been defined as either relative or purely political. Relative political offenses are otherwise common crimes committed in connection with a political act, such as a homicide committed in the course of a general uprising.[74] If the nexus between the crime and the political act is sufficiently close, the offense is "relatively political" and not extraditable; if the connection is remote or non-existent the accused may be extradited.[75] Purely political offenses are acts aimed directly at the government and are definitionally limited to treason, sedition, and espionage. It is generally agreed that the purely political offenses are not extraditable.[76]

Purely political offenses are easily recognizable, whereas relative political offenses often are difficult to distinguish from common crimes unconnected with a political act. Accordingly, the case law in the political offenses area has concentrated on the definition and interpretation of relative political offenses. In order to gain a full and critical under-

[60] *See generally* 4 G. Hackworth, *supra* note 58, at §§ 313-17; 2 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 1019-26 (2d ed. 1945); 6 M. Whiteman, *supra* note 49, at 799-858; *See also* sources cited in note 21 *supra*. Forsythe, *Political Prisoners: The Law and Politics of Protection*, 9 Vand. J. Transnat'l L. 299 (1976); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226 (1962).

[61] *See* Slavery Convention of 25 September 1926, as amended, 212 U.N.T.S. 17 (registered July 7, 1955); Supplementary Convention on the Abolition of Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (registered April 30, 1957).

[62] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (registered Jan. 12, 1951).

[63] *See* Convention on Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (Effective Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

[64] Garcia-Mora, *Crimes Against Humanity and the Principle of Non-extradition of Political Offenders*, 62 Mich. L. Rev. 927 (1964).

[65] M. Bassiouni, Extradition, *supra* note 21, at 410.

[71] Article II of the Extradition Treaty between the United States and New Zealand provides that the following shall be deemed to be extraditable offenses: "26. [w]rong and damage to property, utilities, or means of transportation or communication by fire or explosive; [and] 27. [a]ny malicious act done with intent to cause danger to property or endanger the safety of any person in connection with any means of transportation." Jan. 12, 1970, 22 U.S.T. 1, 2-3, T.I.A.S. No. 7035 (effective Dec. 8, 1970).

[72] *See* Extradition Treaty, United States-Italy, Jan. 18, 1973, 25 U.S.T. 493, T.I.A.S. No. 8052 (effective March 11, 1973)

[73] Article II of the Convention on Extradition between the United States and France provides that the following shall be deemed to be extraditable offenses: "16. Offenses against the laws relating to the traffic in, possession, or production or manufacture of, opium, heroin, and other narcotic drugs, cannabis, hallucinogenic drugs, cocaine, and its derivatives, and other dangerous drugs and chemicals; or poisonous chemicals or substances injurious to health." Feb. 12, 1970, 22 U.S.T. 407, 409, T.I.A.S. No. 7075 (effective April 3, 1971).

[74] Garcia-Mora, *supra* note 65, at 1239.

[75] *See, e.g., In re* Ezeta, 62 F. 972 (1894).

[76] *See* 6 M. Whiteman, *supra* note 49, at 800; Garcia-Mora, *supra* note 65.

standing of the American approach to relative political offenses it is instructive first to examine British precedent on which the American courts initially relied.

THE BRITISH APPROACH

British extradition law has been governed by statute since the passage of the Extradition Act of 1870.[77] This act specifically provides exceptions for offenses of a political character and offenses for which the offender has been sought with the intent to punish him for a political action.[78] The term "political character," however, is not defined either in the Extradition Act or elsewhere in British statutes. The court in *In re Castioni*[79] made the first judicial attempt to supply content to the phrase. *Castioni* created the basic substantive test which has dominated Anglo-American law in this area since 1891.

Angelo Castolini was arrested in England after Switzerland sought his extradition for the murder of Luigi Rossi, a Swiss government official. The people of the Swiss town of Bellizona had petitioned the government for revision of the Constitution of the province. The government, apparently fearing a loss of power, refused to hold a popular vote on the issue as required by law. The townspeople then raided the town's arsenal and marched to the municipal palace. After being denied entry to the building by Rossi and another government official, the group stormed the building. Castolini, who was one of the first to enter, shot Rossi as he appeared in the palace's passageway. The record is silent as to whether Rossi offered any armed resistance, but testimony by a leader of the uprising indicates that he did not.[80] Following the takeover of the palace a provisional government controlled the province until the government of the Republic restored order.

Justice Denman concluded that the events in Bellizona at the time of the killing amounted to a state of war within the province and that Castolini was an active participant at a very early stage of the uprising.[81] In finding Castolini not extraditable, Justice Denman formulated the now classic test for application of the political offense exception: first, there must be a political disturbance at the time of the offense; and second, the offense must constitute an overt act incidental to or part of the political disturbance.[82]

A terrorist attack by an avowed anarchist provided the British courts with opportunity to further define the *Castolini* political disturbance test two years later in *In re Meunier*.[83] Meunier had set off various explosive devices at the Cafe Very in Paris and in military barracks outside the city. The explosions killed several individuals, and Meunier sought refuge in England. The French government requested his extradition for murder, attempted murder, and willful damage to buildings. A British divisional court rejected Meunier's habeas corpus petition and held the political offense exception inapplicable to anarchist-inspired offenses.

This holding reflected hostility to the anarchist movement which characterized the period. Non-aligned terrorist-type activities aimed at promoting disorder and disharmony were viewed not as politically related but as a common evil unworthy of protection. Justice Case spoke for the Court:

> [I]n order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other, and if the offense is committed by one side or the other in pursuance of the object, it is a political offense, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the separate body of citizens.[84]

The Court's rationale appears to address both the intent of the offender and the impact of his act.

[77] Extradition Act, 1870, 33 & 34 Vict., c. 52.

[78] The Extradition Act of 1870, 33 & 34 Vict., c. 52, reads in pertinent part:

> (1) A fugitive criminal shall not be surrendered if the offense to which is surrendered or demanded is one of a political character or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State that the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character.

[79] [1891] 1 Q.B. 149.

[80] *Id.* at 151.

[81] *Id.* at 152.

[82] *Id.* at 159. According to Justice Denman:

> The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.

[83] *Id.* [1894] 2 Q.B. 415.

[84] *Id.* at 419.

An offense which is intended only to disrupt the social order, but not to maintain or alter the government, is not political. Likewise, an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception.

The English courts first considered the motives of a requesting government in 1895. In *In re Arton* the French government sought a fugitive on charges of embezzlement and fraud.[88] The accused claimed that the French government actually sought to regain jurisdiction over him in order to interrogate him about a political matter. He therefore argued that he was not extradictable because "the requisition for his surrender ha[d] in fact been made with a view to punish him for an offense of a political character."[89] Rejecting this argument, Lord Russell held that the provision under which Arton claimed protection was analogous to the doctrine of speciality,[90] and that it was therefore outside the province of the courts to determine the good faith of the requesting country.[91] He further held that an offense of a political character must be readily defineable and not subject to future definition.[92]

These three cases provided a relatively narrow framework for the application of the political offense exception until the middle of this century: a political offense was defined as incidental to or part of a political disturbance, excluding crimes aimed at the civilian population or undertaken only to create social disorder. The good faith of the requesting country was not questioned. In 1953, however, the case of *Regina v. Governor of Brixton Prison, ex parte Kolczynski*[93] extended the political offense exception.

In *Kolczynski* the British court first allowed the defense to be raised in the absence of a political disturbance in the requesting country.[94] The case involved seven crew members of a Polish fishing trawler who sought political asylum in England after taking control of their boat from a communist crew in international waters. The Polish government requested extradition of the sailors for the common crimes of use of force, depriving superiors and other members of the crew of their freedom, wounding a member of the crew, damaging the trawler's wireless, and preventing the ship's captain from maintaining command, thus exposing the crew to the danger of calamity at sea and loss of life.[95] The Court permitted the fishermen to introduce various documents showing that any trial in Poland ostensibly for the extradited offenses would in fact result in punishment for the treasonous act of defecting to a capitalist country.[96] This evidence led the Court to deny extradition under the political offense exception. Justice Cassels concluded that extradition was being sought with a view toward punishing the defendants for political acts and that therefore the motives of the requesting country precluded surrender of the fugitives under the second part of the Extradition Act.[97] Justice Goddard, on the other hand, reached the same result without emphasizing the motives of the Polish government. Rather, he suggested that a humanitarian perspective of changing world conditions required a more liberal interpretation of *Castioni* even where the offenses did not form part of a general uprising. He reasoned that the evidence admitted on the prisoners' behalf showed that their crimes were political in that they were aimed at the Polish government which suppressed any meaningful dialogue within its border.[98]

Although the justices differed in their reasoning, the ultimate result in *Kolczynski* was to apply the political offense exception to an act unconnected to a general disturbance solely because of the motives of the parties involved. The Court's divided opinion did not make clear whether future decisions would rest on the motives of the requesting country or on those of the defendant, but it was apparent that the Court was willing to consider the nature of the requesting government in applying the political offense exception. The *Kolczynski* case marked the British courts' farthest extension of the political offense exception, and many scholars believed that it offered hope to those who must commit crimes to escape persecution in their homeland.[99]

[88] [1895] 1 Q.B. 108; [1896] 1 Q.B. 509.

[89] [1896] 1 Q.B. 108.

[90] The doctrine of specialty allows the requesting country to try the accused only for the offense for which extradition was sought. *See* note 128 *infra*.

[91] [1896] 1 Q.B. at 115.

[92] *Id.* at 116. *See also* concurring opinion of Wills, J. *Id.* at 115–16.

[93] [1954] 1 Q.B. 540; *See* discussion in I.A. SHEARER, *supra* note 12, at 173–78.

[94] [1954] 1 Q.B. 540.

[95] *Id.* at 543.

[96] *See* [1955] 3 All E.R. 33.

[97] [1955] 1 Q.B. at 548.

[98] *Id.* at 549–50 (Goddard, C.J.). It is at least arguable that such decisions involving humanitarian considerations are better left to the executive branch of government as in American extradition proceedings.

[99] Cantrell, *supra* note 9; *see* Garcia-Mora, *supra* note 65, at 1244.

The *Kolczynski* decision was later refined in *Schtraks v. Israel*.[91] In *Schtraks* the defendant, Shalom Schtraks, had attempted to have his nephew educated as an Orthodox Jew against the wishes of the boy's parents. After hiding the youth in a settlement in Israel he fled to England. Israel sought Schtraks' extradition on the charge of child stealing and perjury. During the extradition proceeding, Schtraks attempted to show the close interrelationship of politics and religion within Israel. He also attempted to demonstrate that the question of religious orthodoxy was a highly charged political issue in Israel. The Court, however, refused to find that the act was political. Although Schtraks' actions were intended to avoid what he perceived as political persecution, the Court concluded that they were based ultimately on personal motivations and that the political nature of the act was only a tangential factor.[92]

The Court thus declined to adopt a "pure motive" approach. Like the justices in *Kolczynski*, Viscount Radcliffe pointed out that the test in *Castioni* was still valid, but not conclusive in determining whether an offense was political.[93] Offering a refinement of the *Kolczynski* holding, the Viscount Radcliffe stated that it was necessary to evaluate the objective conditions surrounding the accused's actions and to determine whether the requesting nation seeks his extradition primarily for "criminal" or for "political" reasons.[94] If the posture of the requesting government is politically neutral, then the accused may be extradited regardless of motive:

> There may, for instance, be all sorts of contending political organizations or forces in a country, and members of them may commit sorts of infractions of the criminal law in the belief that by so doing they will further political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.[95]

Reconciling *Castioni* and *Schtraks* appears to require the continued application of the nexus test to offenses which form part of a disturbance or uprising. When the exception is claimed for isolated acts, the British courts seem willing to examine the accused's motives as well as those of the requesting country. Implicit in this approach is the courts' constant reevaluation of the political offense exception in light of the existing international environment.

THE AMERICAN APPROACH

The approach of the American judiciary to the political crimes exception has not substantially deviated from the *Castioni* test, which required that an overt act be committed in furtherance of a political disturbance. The American courts, unlike their British counterparts, have not been willing to consider the motivations of either the defendant or the requesting country.[96] This narrow interpretation of the exception may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising.[97] The strict adherence to the requirement that the act be tied to an uprising or disturbance may operate to exclude from protection many individual acts of

[91] [1962] 3 All E.R. 529.
[92] *Id.* at 540.
[93] *Id.*, where the Justice states:
> In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner." It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international aspect.

[94] *Id.*
[95] *Id.*
[96] *See* note 64 *supra*; *see also* Peroff v. Hylton, 542 F.2d 1247; Garcia-Guillern v. United States, 450 F.2d 1189.
[97] *See, e.g.*, United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). *Cf.* Schtraks v. Israel [1962] 3 All E.R. 529. With regard to the question of contemporaneity, Viscount Radcliffe noted:
> Generally speaking, the courts' reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range. This is seen in the very full consideration that was given to the question in *Re Castioni* particularly when counsel for the applicant's argument in that case is set against the subsequent observations of the three judges who decided it, Denman, Hawkins and Stephen, JJ. It was recalled that during the debate of 1866 that preceded the Extradition Act, John Stuart Mill, then a member of the House of Commons, had suggested as a definition, "any offence committed in the course of or furthering of civil war, insurrection, or political commotion." Stephen, J., himself had offered the view in his *History of the Criminal Law of England*, Vol.

legitimate political resistance. Conversely, the overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder. Theoretically, review of certifications of extradition by the Secretary of State may justify and partially remedy the problem of underinclusiveness,[104] however, the State Department's traditional policy of noninterference has resulted in almost uniform enforcement of judicial orders of extradition.[105] In those cases where a strict construction of *Castioni* results in a denial of extradition, the Secretary of State is, of course, entirely precluded from acting.[106]

The narrow interpretation of *Castioni* was first adopted by a United States court in an 1894 case, *In re Ezeta*,[107] involving a request by San Salvador to extradite its former President, Antonio Ezeta, and four of his military officers from the United States. The requisition charged these individuals with the crimes of murder, robbery, and arson. These charges allegedly arose from acts that Ezeta and his aides undertook while attempting to maintain their government against the revolutionary movement that eventually overthrew them.[108] The trial court held that all but one of the alleged events were political because they occurred during a time of armed rebellion within the country. The exception involved an individual charged with the attempted murder of a civilian. The court held *Castioni* inapplicable to this charge because the crime took place four months prior to the start of armed violence in San Salvador. In responding to the defendant's contention that San Salvador's request was politically motivated, the Court deferred the issue to resolution by the Secretary of State.[109]

Two years later the Supreme Court refined the *Ezeta* court's application of the political offense exception. In *Ornelas v. Ruiz*[110] the government of Mexico sought the extradition of three individuals who had crossed the Rio Grande with a group of approximately 140 other armed men. The group subsequently attacked forty Mexican soldiers in the village of San Ignacio and terrorized the town and its citizenry. The magistrate first hearing the case concluded that the defendants' actions were personally motivated and not intended to further the political disturbances then occurring within Mexico. The Supreme Court affirmed the magistrate's ruling as supported by the record, thus interpreting *Castioni* as requiring that the defendants' actions be not only contemporaneous with some political disturbance, but also unqualifiedly connected with the furtherance of the political revolt.[111]

The history of the extradition proceedings against Andrija Artukovic[112] underscores the importance of the distinction between "furtherance" and contemporaneity. The Yugoslavian government sought Artukovic, the former Minister of Internal Affairs for the pro-German government of Croatia during World War II, for allegedly ordering the execution of two hundred thousand inmates of concentration camps in Yugoslavia during the war. While awaiting an extradition hearing on the matter, Artukovic filed a petition for a writ of habeas corpus with the District Court for the Northern District of California.[113] The Ninth Circuit affirmed the district court's decision to grant the writ prior to any evidentiary hearing.[114] Both courts determined that the offenses charged were political because they occurred during the German invasion of Yugoslavia and subsequent establish-

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2, p. 71, that political offenses comprised only those crimes that were "incidental to and formed a part of political disturbances." The court was unanimous in holding Mott's definition to be altogether too wide. The offender must be at least politically motivated. 3 All E.R. at 539.

[104] *See* note 64 *supra*, and accompanying text.

[105] *Id.*

[106] *In re* McMullen, No. 3-78-1099 MG, serves as such an example.

[107] 62 F. 972 (N.D. Cal. 1894).

[108] The acts alleged in the extradition complaint included: (1) robbery of a bank to pay soldiers involved in fighting revolutionary forces; (2) the murder of a civilian who was thought to be a spy; (3) the hanging of four individuals who refused to defend the then existing government against the revolutionary forces; (4) the murder of an individual who helped the revolutionary forces in overthrowing the Ezeta government; 62 F. 972, 979-80 (N.D. Cal. 1894).

[109] 62 F. at 986 (N.D. Cal. 1894).

[110] 161 U.S. 502 (1896).

[111] *Id.* at 511.

[112] 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 393 (1958), *decision on remand sub nom.* United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). The Yugoslavian indictment accused Artukovic of "having, in the course of 1941 and 1942, when Yugoslavia was occupied by German and Italian troops, issued orders based on criminal motives, hatred, and the desire for power to members of bands of which he was one of the leaders, to carry out mass slaughters of the peaceful civilian population of Croatia, Bosnia and Herzegovina." 247 F.2d at 206.

[113] 140 F. Supp. 245 (S.D. Cal. 1956).

[114] 247 F.2d 198 (9th Cir. 1957).

ment of the short-lived independent government of Croatia.[111] Neither court considered the civilian status of Artukovic's alleged victims or analyzed whether the murder of two hundred thousand persons was actually in furtherance of a political end.[112]

The United States Supreme Court, in a one paragraph per curiam opinion, reversed the Ninth Circuit and remanded the case for an evidentiary hearing.[113] The hearing was subsequently held before a federal magistrate and extradition again was refused, this time on the ground that there was insufficient evidence to establish probable cause of Artukovic's guilt.[114] In dicta, however, the magistrate adopted the earlier Ninth Circuit opinion which concluded that because the crimes were committed during a struggle for power they were political in character.[115] Neither court analyzed, nor did they seem to consider, the requirement that a nexus be shown between the mass killings and the political struggle. This conclusion, although not the ultimate holding in the *Artukovic* case, is unsettling because it places greater emphasis on the timing of the defendant's acts than on whether he in any sense furthered a political revolt. Both the circuit and district courts refused to interpret war crimes against civilians as being beyond the purview of the *Castioni* test.[116]

Since *Artukovic*, the courts have applied the *Castioni* test with a relatively consistent regard for whether the accused committed the offense in furtherance of political revolt. In *Romeo v. Diaz*,[117] for example, the Cuban government requested extradition of two former soldiers who had escaped from prison following Castro's rise to power. A Cuban court had convicted the men for killing an escaping prisoner shortly following Batista's downfall. The United States district court concluded that the victim had been a political prisoner captured in furtherance of the uprising and that the offense therefore was political in character. The court looked beyond the existence of the Castro uprising to consider the identity and political position of the victim as well as the manner in which the acts of the accused played a part in the revolution.[118] Similarly, in *In re Gonzales*[119] the district court held that, in the absence of an uprising, the murder of two prisoners by a guard in the Dominican Republic could not have been in furtherance of a political goal.[120]

Other than in scattered dicta, the American courts have refused to inquire into the motive behind the requesting country's requisition.[121] For example, in *Jimenez v. Aristeguieta*[122] the Venezuelan government sought the extradition of the recently deposed President Jimenez on charges of murder, embezzlement, and fraud, all extraditable offenses under the treaty between the United States and Venezuela. After a finding of probable cause on the embezzlement and fraud charges,[123] the court certified Jimenez to the Secretary of State who ordered his extradition to Venezuela.[124] The case is significant because it indicates the strictness of the American judiciary's interpretation of the political offense exception. Even where a former head of state was sought by those who forcibly overthrew him, the court declined to examine the motives behind the request.[125]

[111] 140 F. Supp. at 245-47; 247 F.2d at 204.

[112] *Id.*

[113] 355 U.S. 393 (1958) (hearing to be conducted pursuant to 18 U.S.C. § 3184).

[114] 170 F. Supp. 383 (S.D. Cal. 1959).

[115] *Id.* at 393.

[116] 140 F. Supp. at 247; 247 F.2d at 204-05; 170 F. Supp. at 392-94. *See also* M. BASSIOUNI, EXTRADITION, *supra* note 21, at 420-28.

[117] 179 F. Supp. 459 (S.D. Fla. 1959).

[118] *Id.* at 462-63. Although the court cited *Artukovic* as authority, it is clear from the opinion that the analysis in *Diaz* went well beyond a determination of contemporaneity.

[119] 217 F. Supp. 217 (S.D.N.Y. 1963).

[120] *Id.* at 221. The district judge did suggest in dicta that under some circumstances it might be appropriate to relax the political disturbance requirement, particularly where the requesting government is a totalitarian state. The court concluded, however, that Gonzales had been in no sense politically motivated and was therefore definitely liable to extradition under any approach. *Id.* at 221 n.9.

[121] *See In re* Gonzales, 217 F. Supp. at 221.

[122] 311 F.2d 547 (5th Cir. 1962), *aff'd per curiam sub nom.* Jimenez v. Hixon, 314 F.2d 654 (5th Cir.), *cert. denied*, 373 U.S. 914 (1963).

[123] Similarly, it appears that the American judiciary has not considered financial crimes whether committed by governmental officials or businessmen as falling within the political crimes exception. *See* Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); Garcia-Guillern v. United States, 450 F.2d 1189; *In re* Locatelli, 468 F. Supp. 568 (S.D. Fla. 1979); *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978); Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77, *cert. denied*, 364 U.S. 851 (1960).

[124] Prior to extradition, the Secretary of State received the assurances of the Venezuelan government that Jimenez would be tried only for those offenses for which he was extradited. Jimenez v. Aristeguieta, 311 F.2d 547.

[125] *See* I.A. SHEARER, *supra* note 12, wherein the author, after reviewing the American approach, severely criticizes it as narrow and outdated.

What emerges from the American decisions is a considerably greater adherence to the political disturbance requirement than that of Great Britain.[120] The potential harshness of this requirement upon individuals undertaking individual actions of conscience is somewhat mitigated, however, by the fact that purely political offenses, such as sedition, are never extraditable.[121] Furthermore, the rule of dual criminality[122] will prevent the extradition of persons sought for nonviolent speech or assembly offenses since those acts are not crimes in the United States. Thus, political dissent which does not include the commission of a common crime is protected under the treaty exception whether or not undertaken in aid of a general uprising. Finally, it always remains the prerogative of the executive branch to refuse extradition on political grounds.[123]

The American approach, however, provides a workable standard only when the courts avoid the pitfall of mechanistic application. Contemporaneity with a political disturbance must be viewed as a prerequisite to the defense, not as its embodiment. In order to distinguish actual revolution from random terror the judiciary must undertake the difficult and delicate task of deciding what acts are or are not attempted in furtherance of a political uprising. Unfortunately, the courts have not to date developed a uniform procedural approach to this determination.

Raising the Political Offense Exception in American Courts

American law has not developed a uniform procedure for raising or sustaining the political offense exception. In many ways the exception resembles both a jurisdictional issue and an affirmative defense. Because a political connection makes an offense nonextraditable, it may be seen as depriving the court of jurisdiction.[124] On the other hand, a court might treat the political nature of the offense as a collateral fact which defeats or negates the claim for extradition and which thus amounts to an affirmative defense. The principal distinction between these two approaches is in their relative placement of the burden of production and the ultimate burden of proof.

The jurisdictional approach implies that the requisition for extradition must allege the nonpolitical nature of the crime as an element of the court's jurisdiction. Since the requesting country must allege that the treaty of extradition is operative and applicable to the particular case,[125] the request should then also contain sufficient facts to demonstrate that the underlying offense is not political in nature. The burden of pleading such facts is on the requesting country, and a request which failed to meet this burden could be challenged in a pretrial motion akin to a motion to dismiss.

This approach, adopted by both the district[126] and circuit courts[127] in the *Artukovic* case, was ultimately rejected by the Supreme Court.[128] Artukovic, it will be recalled, was charged by the Yugoslavian government with the murder of thousands of concentration camp inmates.[129] The defendant contended that the crimes charged were political offenses and prior to any evidentiary hearing he filed a petition for writ of habeas corpus.[130] The district court granted the writ on the ground that the political nature of the crimes was apparent on the face of the indictment.[131] The circuit court affirmed, recognizing that the case was one which dealt with relative political offenses.[132] Both lower courts determined that the crimes were political primarily because the indictment referred to the German occupation of Yugoslavia and to the defendant's position in the Croatian government. Thus, the burden was placed on the requesting country to include in its requisition sufficient information to remove the charged murders from the political sphere, or at least to refrain from inserting any information that even suggested a political connection. Because the Yugoslavian indictment of Artukovic did not meet this burden, the lower courts dismissed the requisition prior to trial. The Supreme Court, however, subsequently vacated the writ and remanded the case for hearing.[133] Although the Court's one paragraph per curiam

[120] *Cf. In re* Gonzalez, 217 F. Supp. at 721 (murder in absence of uprising not political). *See also* Cantrell, *supra* note 9, wherein the author urges American courts to extend the *Gonzalez* interpretation to make the American approach to extradition consistent with England.

[121] *See* note 74 *supra* and accompanying text.

[122] *See* note 37 *supra* and accompanying text.

[123] *See* text accompanying notes 57–63 *supra*.

[124] M. Bassiouni, Extradition, *supra* note 21, at 515.

[125] *See* note 37 *supra*.

[126] Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956).

[127] Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957).

[128] Karadzole v. Artukovic, 355 U.S. 393 (1958) (per curiam).

[129] Artukovic v. Boyle, 140 F. Supp. at 246.

[130] *Id.*

[131] *Id.* at 247.

[132] Karadzole v. Artukovic, 247 F.2d at 203–04.

[133] 355 U.S. 393.

ment of the short-lived independent government of Croatia.[111] Neither court considered the civilian status of Artukovic's alleged victims or analyzed whether the murder of two hundred thousand persons was actually in furtherance of a political end.[112]

The United States Supreme Court, in a one paragraph per curiam opinion, reversed the Ninth Circuit and remanded the case for an evidentiary hearing.[113] The hearing was subsequently held before a federal magistrate and extradition again was refused, this time on the ground that there was insufficient evidence to establish probable cause of Artukovic's guilt.[114] In dicta, however, the magistrate adopted the earlier Ninth Circuit opinion which concluded that because the crimes were committed during a struggle for power they were political in character.[115] Neither court analyzed, nor did they seem to consider, the requirement that a nexus be shown between the mass killings and the political struggle. This conclusion, although not the ultimate holding in the *Artukovic* case, is unsettling because it places greater emphasis on the timing of the defendant's acts than on whether he in any sense furthered a political revolt. Both the circuit and district courts refused to interpret war crimes against civilians as being beyond the purview of the *Castioni* test.[116]

Since *Artukovic*, the courts have applied the *Castioni* test with a relatively consistent regard for whether the accused committed the offense in furtherance of political revolt. In *Ramos v. Diaz*,[117] for example, the Cuban government requested extradition of two former soldiers who had escaped from prison following Castro's rise to power. A Cuban court had convicted the men for killing an escaping prisoner shortly following Batista's downfall. The United States district court concluded that the victim had been a political prisoner captured in furtherance of the uprising and that the offense therefore was political in character. The court looked beyond the existence of the Castro uprising to consider the identity and political position of the victim as well as the manner in which the acts of the accused played a part in the revolution.[118] Similarly, in *In re Gonzalez*[119] the district court held that, in the absence of an uprising, the murder of two prisoners by a guard in the Dominican Republic could not have been in furtherance of a political goal.[120]

Other than in scattered dicta, the American courts have refused to inquire into the motive behind the requesting country's requisition.[121] For example, in *Jimenez v. Aristeguieta*[122] the Venezuelan government sought the extradition of the recently deposed President Jimenez on charges of murder, embezzlement, and fraud, all extraditable offenses under the treaty between the United States and Venezuela. After a finding of probable cause on the embezzlement and fraud charges,[123] the court certified Jimenez to the Secretary of State who ordered his extradition to Venezuela.[124] The case is significant because it indicates the strictness of the American judiciary's interpretation of the political offense exception. Even where a former head of state was sought by those who forcibly overthrew him, the court declined to examine the motives behind the request.[125]

[111] 140 F. Supp. at 245-47; 217 F.2d at 204.

[112] *Id.*

[113] 355 U.S. 393 (1958) (hearing to be conducted pursuant to 18 U.S.C. § 3184).

[114] 170 F. Supp. 383 (S.D. Cal. 1959).

[115] *Id.* at 393.

[116] 140 F. Supp. at 247; 217 F.2d at 204-05; 170 F. Supp. at 392-94. *See also* M. BASSIOUNI, EXTRADITION, *supra* note 21, at 420-26.

[117] 179 F. Supp. 439 (S.D. Fla. 1959).

[118] *Id.* at 462-63. Although the court cited *Artukovic* as authority, it is clear from the opinion that the analysis in *Diaz* went well beyond a determination of contemporaneity.

[119] 217 F. Supp. 717 (S.D.N.Y. 1963).

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[150] *See* note 74 *supra* and accompanying text.

[151] *See* note 37 *supra* and accompanying text.

[152] *See* text accompanying notes 57–63 *supra*.

[153] M. Bassiouni, Extradition, *supra* note 21, at 515.

[154] *See* note 37 *supra*.

[155] Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956).

[156] Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957).

[157] Karadzole v. Artukovic, 355 U.S. 393 (1958) (per curiam).

[158] Artukovic v. Boyle, 140 F. Supp. at 246.

[159] *Id.*

[160] *Id.* at 247.

[161] Karadzole v. Artukovic, 247 F.2d at 203–04.

[162] 355 U.S. 393.

opinion did not set forth the basis for decision, the reason was clearly the failure of the district court to hold an evidentiary hearing.[145]

Artukovic, though, actually charged with the common crime of murder, claimed that the acts were committed in a political context.[146] His defense, therefore, was that the extradition request was for a relative political offense.[147] If the American test for a relative political offense was mere contemporaneity with a political disturbance, then the issue might reasonably be resolved on a motion to dismiss or pretrial habeas corpus petition. The actual test, however, is whether the acts were committed in furtherance of a political goal.[148] Determination of this issue requires consideration of the motives of the defendant as well as both the context and impact of the act. Since this information cannot be gathered from an examination of the requisition, the extraditing court must hear evidence on the issue. This requirement accords with the often stated principle that the political offense exception is a mixed issue of law and fact, but primarily one of fact.[149]

An additional consideration against the jurisdictional approach is the burden that it places on the requesting country. In order to insulate its requisition from a claim of a relative political offense, the requesting country must allege sufficient information to demonstrate that the crimes were not in furtherance of a political objective. Not only would this require the requesting country to "plead proof," it would require proof of a negative. The better approach, comporting with the purposes of extradition treaties, requires only that the requisition set forth the ultimate facts in support of the request and leaves the finer factual issues for resolution at trial.

There are, however, two political defenses that the accused might raise by motion prior to trial. A requisition for extradition charging a purely political offense rather than a common crime, obviates the need for any factual determination because purely political offenses are never extraditable.[150] Similarly, a defense based upon the doctrine of dual criminality, requiring only an examination of the relevant foreign and American statutes,[151] could also be raised on motion. A claim of relative political offense however, is an issue of substance which requires evidentiary support and must be resolved at trial. Although it seems clear that the defendant bears the initial burden of raising the defense,[152] two procedural questions remain: (1) what quantum of evidence, if any, is required to raise the defense, and (2) who bears the ultimate burden of proof?

The fact that no court has specifically or systematically addressed these questions[153] might, in part, be attributable to the very nature of the extradition process that intertwines domestic law and foreign affairs. The judiciary, consistent with a policy of preserving flexibility in matters touching upon foreign policy,[154] has allowed each magistrate to define his own procedural approach.[155] To shift the burden to the requesting courts, some courts have required expert testimony pursuant to statute[156] to explain the surrounding political situation,[157] whereas others appear only to have required an assertion of the defense.[158] This case by case ap-

[145] This was the interpretation of the federal magistrate who heard the case on remand. United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

[146] Artukovic v. Boyle, 140 F. Supp. 245.

[147] Karadzole v. Artukovic, 247 F.2d 198.

[148] *See* text accompanying notes 121-24 *supra*.

[149] Ornelas V. Ruiz, 161 U.S. at 504; M. BASSIOUNI, EXTRADITION, *supra*, note 21 at 400.

[150] *See* note 74 *supra* and accompanying text. The formal charge will always appear on the face of the request. *See* note 37 *supra*.

[151] *See* note 44 *supra*.

[152] *See In re* Gonzalez, 217 F. Supp. 717; Ramos v. Diaz, 179 F. Supp. 450. In *Artukovic* the district court on remand referred to the political offense exception as an affirmative defense. United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. at 392.

[153] *See* 2 C. HYDE, *supra* note 63, at 1025; Proceedings of The American Society of International Law, Third Annual Meeting (April 23 & 24, 1909). The test as applied by American courts is "when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove to the contrary." Ramos v. Diaz, 179 F. Supp. at 463 (quoting 2 C. HYDE, *supra* note 63, at 1025).

[154] United States v. Curtiss-Wright Export Corporation v. United States, 299 U.S. 304 (1936). *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (judiciary may interfere in function of another branch of government).

[155] *See* First National City Bank of New York v. Aristeguieta, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 373 U.S. 49 (1963).

[156] 18 U.S.C. § 3191.

[157] *See In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.).

[158] This appears to be the case from the court's language in Ramos v. Diaz, 179 F. Supp. at 463.

It appears, after a careful review of the literature and case law, that the first and only major dialogue on this issue occurred before the American Society of International Law in 1909. Two experts on extradition matters addressed this issue and came to two entirely opposite conclusions based upon policy considerations. J. Reuben Clark, Jr., a solicitor with the Department of State,

proach might be adequate for an infrequently raised defense. At a time, however, when the extradition of Iranians, Palestinians, Irish, Haitians, and others is a topic of almost daily political, legal, and popular concern, it clearly is insufficient.

RAISING THE DEFENSE

Anglo-American law has long depended on the allocation of burdens of production to achieve basic policy goals.[156] In criminal cases this allocation reflects not only a concern for fairness to the defendant, but also a social judgment that it ought to be difficult for the state to deprive persons of their liberty.[157] Thus, the defendant is presumed innocent until proven guilty, and the prosecution must prove every element of the crime beyond a reasonable doubt.

Even within this framework, however, defendants may be required to meet certain burdens of production when raising certain defenses. These burdens vary according to policy considerations relevant to the defense involved. Thus, a defendant claiming that his confession was obtained in violation of his *Miranda* rights need only assert involuntariness in order to require the state to prove compliance with the rule by a preponderance of the evidence.[158] On the other hand, a defendant seeking to suppress evidence of a suggestive pretrial identification must himself establish suggestiveness by a preponderance of the evidence.[159] This disparity in the defendant's burden reflects the primacy in our system of the privilege against self incrimination, in contrast to the lesser importance accorded to the less intrusive nature of a pretrial identification. Similarly, in *Leland v. Oregon*[160] the United States Supreme Court held that the states are free to place the burden of establishing affirmative defenses upon the defendant, and may even require that defendants prove certain defenses beyond a reasonable doubt.[161]

The burden of establishing the political offense exception also may be seen as a question of policy rather than one of constitutional rights or fundamental fairness.[162] It is necessary to balance the competing considerations of international comity, enforcement of treaty provisions, and protection of political dissent, within a procedural framework that allows the defendant a fair opportunity to raise the defense without unduly burdening the requesting state.

In *Ramos v. Diaz*[163] the district judge addressed the question of relative burdens and concluded that "when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove to the contrary."[164] This interpretation is most advantageous to the defense because the "tending to show" standard can easily be met in virtually every case where the defendant claims the benefit of the treaty exception. The burden then would shift to the requesting country to disprove the political connection, presumably by at least a preponderance of the evidence.[165] The difficulty with this standard is that its operation requires the requesting country to negate all possible political connections without first requiring the defendant to establish the parameters of his claim.

The presiding magistrate in *Abu Eain* recognized this problem. Abu Eain argued that in order to shift the burden of proof to the requesting state, he need only produce some evidence which tended to

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argued that the accused bore the burden of raising and proving the political offense defense by a preponderance of the evidence. His opinion was based upon general principles involved in the pleading of jurisdictional issues and the fact that the defense ran to the Court's jurisdiction under habeas corpus. On the other hand, Julian W. Mack, a practitioner from Chicago, argued that the raising of the political offense exception went to the merits of the extradition request and once raised by the introduction of some evidence by the accused, the burden shifted to the requesting country to show that the act was a common crime by some unspecified standard of proof. Thus, it was Mr. Mack's position, at that time, that the underlying policy of the political offense exception, namely the promotion of political change, required that special protection be afforded to anyone claiming to fall under the exception, as long as some political rationale could be applied under domestic law. Proceedings of the American Society of International Law, *supra* note 157, at 95-126 & 144-65 (addresses of J. Reuben Clark, Jr., and Julian W. Mack).

[156] McCormick on Evidence 786-88 (2d ed. 1972).

[157] *In re* Winship, 397 U.S. 358 (1970).

[158] Miranda v. Arizona, 384 U.S. 436 (1966).

[159] United States v. Crews, 48 U.S.L.W. 4325 (1980).

[160] Patterson v. N.Y., 432 U.S. 197 (1977).

[161] 343 U.S. 790 (1952).

[162] Patterson v. N.Y., 432 U.S. 197 (1977).

[163] 179 F. Supp. 459.

[164] *Id.* at 463.

[165] *See* Ramos v. Diaz, 179 F. Supp. at 463. The requesting country in an extradition hearing only bears the burden of showing probable cause because the ultimate issue of guilt or innocence is not under consideration by the extraditing court. *See* note 39 *supra* and accompanying text. The court, however, does resolve the merits of the political offense exception defense. In order for the court to reach a decision one party or the other must establish its case by the greater weight of the evidence.

show the political nature of the crime.[169] The magistrate, however, rejected this contention, and ruled that the defendant was required to show the link between the alleged crimes and their political objective.[170] This requirement recognizes that while mere contemporaneity might tend to show a political connection, more evidence is necessary to meet the test of the substantive law. In essence, the magistrate in the Abu Eain case ruled that in order to raise the political offense exception the defendant must present evidence of each of the substantive elements of the defense.[171]

The better approach is to require the defendant to present a prima facie case that the offense is a political one. The defendant would have to present evidence, either through cross-examination or pursuant to 18 U.S.C. § 3191, which standing alone would be sufficient to show: (1) the existence of a political disturbance; (2) the political motivation or goal of the defendant; and (3) that the acts charged were undertaken in furtherance of the political goal.[172] This evidentiary requirement increases the burden on the defendant, but only with regard to specificity. He may not simply claim the defense, but must establish its elements. He still might do this solely upon his own testimony, or he might rely upon expert witnesses, judicial notice, or even cross-examination. In any event, the requesting state would be given notice of the nature of the claimed political connection. The prosecution could then adduce its own evidence as to the nature and impact of the charged crimes,[173] but would not face the obligation of contradicting all possible political connections.

Assuming that both parties meet their burden of production, one final question remains: which party bears the ultimate burden of proof? On this issue the courts of extradition have been neither consistent nor clear. Some courts have held that the defendant must bear the burden,[174] others have placed it on the requesting government,[175] and still others appear to have voiced both positions in the same opinion.[176]

The nature of the decision to be made, however, indicates that the burden of proof by a preponderance of the evidence should be placed on the defendant.[177] As noted above, the absence of a political connection need not be pled in the extradition requisition; it is rather the proof of a political act which defeats the request.[178] The defense does not negate any of the facts of the charge, but constitutes instead an entirely separate issue dependent upon facts which are beyond the elements of the crime.[179] Since the issue is wholly collateral, the burden of proof must remain upon the party who asserts the claim.[180]

This conclusion will accomplish the basic policy of international cooperation in extradition without seriously compromising political dissent. The placement of the burden of proof will not affect persons charged with either purely political offenses or with offenses involving speech and assembly. Those who have been charged with common crimes will be required to establish a political nexus, but proof of such a connection is uniquely under the control of the defendant. In any event, once it is accepted that the defendant bears the responsibility of establishing a prima facie case for the exception, and that preponderance of the evi-

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[169] *In re* Abu Eain, No. 79 M 175 at 19. In his habeas corpus brief to the Seventh Circuit Abu Eain argued that he had met the "tending to show" standard by presenting evidence of the general tactics of the Palestine Liberation Organization. He had offered evidence at trial that bombings directed at Israeli civilians were "typical and common" undertakings of the P.L.O., but he did not testify himself and he did not offer any evidence concerning the motivations behind the specific bombing with which he was charged. Brief for Petitioner at 25–29, No. 80-1487. On this basis he argued that the requesting state was required to disprove that the charged murders were political crimes. *Id.* at 29.

[170] *Id.* at 20.

[171] *Id.* at 19–21.

[172] The requesting state may meet its burden of production by relying on legal presumptions, rather than by actually introducing evidence. Such presumptions include (1) the rule of speciality, (2) the presumption of good faith on the part of the demanding government, and (3) the presumption that crimes directed against civilians are not "political." Regarding the presumption of good faith, *see In re* Gonzalez, 217 F. Supp. 213; Gallina v. Fraser, 278 F.2d 77. For cases concerning the nonpolitical nature of crimes against civilians, *see* Ornelas v. Ruiz, 161 U.S. 502; *In re* Meunier, [1894] 2 Q.B. 415. *See also In re* Wisconsin and Armstrong, 28 D.L.R.3d 513 (County Ct. of York, Ontario, Canada, 1977), *aff'd*, 32 D.L.R.3d 265 (Fed. Ct. App. 1973); *In re* Ekpenyong, (Fed. Ct. Switz. 1930) 7 Ann. Dig. 292 (Case No. 188) in 6 M. WHITEMAN, *supra* note 49, at 840.

[173] *In re* Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.).

[174] Ramos v. Diaz, 179 F. Supp. at 453.

[175] *In re* McMullen, No. 3-78-1099 MG, mem. at 2, 6 (N.D. Cal. May 11, 1979).

[176] *Id.* at 6.

[177] *See* Karadzole v. Artukovic, 355 U.S. 393.

[178] Patterson v. N.Y., 432 U.S. at 209–07.

[179] *Id.* The British courts require that the defendant prove the political character of the crime. *See, e.g.*, Schtraks v. Government of Israel, [1962] 3 All E.R. at 534.

dence is the standard of proof, the question of ultimate burden recedes in importance. This is because in virtually every case the greater weight of the evidence will either establish or not establish that the offense was committed in furtherance of a political objective. The court then may make its decision based upon what actually was proven, rather than upon which party had the obligation of proving it.

The question of burden of proof will remain important only in those cases where the evidence approximates equipoise. In those cases it is appropriate that the balance tip in favor of the requesting state. Our courts generally presume the good faith of those governments with whom we have entered into extradition treaties,[179] and there is scant reason to abandon this principle in favor of individuals who have not established that their actions were in furtherance of political ends. This burden will disadvantage only those who have been charged with common crimes and who have not satisfactorily shown a political nexus. Even in these cases the defendant will continue to have recourse to the Secretary of State. Therefore, it is reasonable to place the ultimate burden of proof on the party claiming the benefit of the political offense exception.[180]

[179] *In re* Gonzales, 217 F. Supp. 717; M. BASSIOUNI, EXTRADITION, *supra* note 21, at 466.

[180] *See* Paterson v. N.Y., 432 U.S. at 207-09; Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 997 (5th Cir. 1977).

CONCLUSION

The role of the American judiciary in the extradition process is mainly preliminary. The courts do not pass upon guilt or innocence, nor do they actually order extradition. Rather, it is the function of the judicial officer to ensure that the defendant is afforded basic due process before the Secretary of State makes the ultimate decision on extradition. Recognition of this limited judicial role no doubt contributes to the limited judicial development of procedural law in this area.

With regard to the political offense exception, however, the courts may actually make the final determination. A judge's decision that a crime falls within the exception may not be reviewed. The importance of this decision to both domestic law and foreign affairs requires not only a strict interpretation of the substantive law but also a coherent procedural framework.[181]

Although the courts have substantially developed a workable interpretation of the political offense exception, no consistent procedural approach has emerged. Congress could provide such an interpretation by enacting new legislation which both defines the meaning of political offense and provides a detailed procedural guide for raising the exception. This would undoubtedly promote both American foreign policy and the international right of political dissent.

[181] The lack of review of judicial decisions applying the political offense exemption also provides an argument in favor of deferring consideration of the issue to the Department of State. *See* note 81, *supra*.

Mr. HUGHES. Thank you, Professor Lubet.

Mr. Hall.

Mr. HALL. You raise a very interesting point here on the burden of proof matter that I would like to discuss with you. You indicate that you believe that the "defendant," we will call him for purpose of this discussion, must prove the exception by objective evidence, by clear and convincing evidence, rather than a preponderance of the evidence. You say that a preponderance of the evidence is subjective in nature.

We are dealing with a criminal case, are we not? Can't we assume that in any instance of this nature, we are dealing with a criminal matter?

Mr. LUBET. We are dealing with a crime.

Mr. HALL. Why would it not be better to have the exception proved beyond a reasonable doubt, as you do in all other criminal cases with which I am familiar, rather than by clear and convincing evidence?

Mr. LUBET. The question of an affirmative defense in criminal cases runs the gamut of the various burdens of proof. It is generally set by statute, and there is no constitutional rule. Some affirmative defense in criminal cases must only be proven by a preponderance of the evidence, some by clear and convincing evidence and some beyond a reasonable doubt.

Mr. HALL. Of course, those are all domestic cases you are talking about.

Mr. LUBET. Those are all domestic cases.

Mr. HALL. If we have something as serious as we have here, using some of the examples that you have used, the *McMullen* case, for instance, why would it not be better for that test to be proven by objective testimony beyond a reasonable doubt? What is there so compelling to use clear and convincing evidence?

Mr. LUBET. Congressman, it is a judgment call, and the argument could be made to use the higher standard. The reason I arrived at the intermediate standard was my thought that it would probably be close to impossible for a defendant to meet the beyond-reasonable-doubt burden of proof, given that he would have to marshal evidence from a foreign country and bring it into an American court and it would probably be a burden so high as to eradicate the defense completely.

Mr. HALL. With the types of offense we are usually concerning ourselves with, don't you think it would be better for that person to have to go as far as he would be compelled to go to provide his exception? To me, it appears we should make it as difficult as possible for someone who is trying to beat the exception. It appears to me, they should be required to exercise every bit of discretion, if you want to use that term, as they can to meet this proof.

Mr. LUBET. May I say the reason I am smiling is that when I wrote my testimony and wrote down this point, I was certain that I was suggesting a higher burden than the subcommittee was going to want.

Mr. HALL. Do you think there would ever be a time in one of these proceedings when the burden of proof would shift to the Government to try to overcome what the defendant has introduced, to prove the exception?

Mr. LUBET. I don't think that the burden ever should or will shift. My view is that the burden ought to be upon the defendant to make out his case.

The problem with shifting burdens—and that was the standard enunciated by several district courts—is well illustrated by the *Abu Eain* case, which I observed in Chicago. In that case Mr. Abu Eain made the argument that once he introduced some evidence of the political nature of the offense the burden ought to shift to the Government to prove that it was not political and, in fact, he based a good part of his appeal on the notion that the Government had failed to prove that the crime was not political. Of course, that is an impossible burden once you shift it.

I think the burden of going forward with the evidence, which is different from the burden of proof would shift, of course, once the defendant makes his case. Then the Government has an opportunity to rebut it if it wishes, but I think the defendant has to stand or fall on the weight of the evidence he has presented.

Mr. HALL. What is the holding of the *Ramos* v. *Diaz* case? You quoted it here. He based his reasoning on the argument of the *Ramos* v. *Diaz* case, as I understand your testimony?

Mr. LUBET. That is right. That is a case from the southern district of Florida, where the Federal judge held that once the defendant introduced any evidence which tended to show that the crime was political, the burden shifted to the Government to prove it was not political by a preponderance of the evidence. Following that holding Mr. Abu Eain claimed that bombings of civilians were "typical acts" of the Palestine Liberation Organization, and that this "tended to show" that the particular bombing was political and therefore the burden should shift to the Government.

Mr. HALL. The *Ramos* case, today is that the prevailing view of the United States?

Mr. LUBET. It is not the prevailing view. It was rejected by the seventh circuit in the *Abu Eain* case.

Mr. HALL. And the *McMullen* case rejected both?

Mr. LUBET. I don't recall, Congressman, but I submit that it ought to be rejected, and I think it ought to be firmly rejected by the Congress as well as by the courts.

Mr. HALL. Thank you. I yield back the balance of my time.

Mr. HUGHES. Mr. Sawyer.

Mr. SAWYER. I have no questions.

Mr. HUGHES. Mr. Lubet, you indicate that you would make some changes in the criteria that is set forth in the proposed legislation defining what would normally not be considered as a political offense and you indicate that you would make some changes in that area. You would exclude every crime of violence. You delineate with a lot more specificity just what areas would be excludable.

Can you give us some categories, some ideas as to what you had in mind?

Mr. LUBET. There is one subsection in section 3194 which excludes from the political offense exception crimes against internationally protected persons and diplomatic personnel. I think that this comes close to doing the job. If that were not seen as a sufficient exclusion, I would add another subsection which excludes from the political offense exception crimes which are intended to

or have the effect of disrupting the social order, social fabric, or social structure and which are not aimed at the organization of government of the country. Those are probably the only two specific exclusions that I would include if I were drafting the bill. I would eliminate the other subsections from the exclusion.

Mr. HUGHES. Would you include the definition of what is generally considered to be political offenses as contained at the top of page 10? Do you think that adds anything to the legislation?

Mr. LUBET. It adds some clarity but it principally states the internationally accepted law. I don't think the bill would suffer if it were omitted. I don't think it hurts the bill to include it, either.

Mr. HUGHES. There have also been some suggestions in earlier testimony that we really haven't specified the standard that is to be used by the court in finding probable cause. How do you feel about that issue?

Mr. LUBET. I am not prepared to give an opinion on that issue.

Mr. HUGHES. I gather you are generally happy with the manner in which we have treated bail.

Mr. LUBET. Yes.

Mr. HUGHES. You would leave the question of the motive of the extraditing jurisdiction to the Secretary of State?

Mr. LUBET. Absolutely.

Mr. HUGHES. I presume you are in accord with the thrust of the legislation which says that a court cannot go beyond the initial filings and question the judicial structure, the penalties meted out in a jurisdiction?

Mr. LUBET. I would generally be in accord with that view. I think the problem Professor Bassiouni posed is a difficult one to answer. I think ultimately I would resolve that with some strong faith that the executive branch of our Government will not cooperate in such a system. I understand, of course, the problem that this puts the executive in a very difficult position. It deprives the executive of the judicial shield, but I suppose if the executive is willing to undergo that deprivation, that is an appropriate approach to take.

Mr. HUGHES. I suppose that Professor Bassiouni's own testimony concluded there still was executive discretion to be exercised by the executive branch to in effect deal with those hardship cases.

Mr. LUBET. I think that the record of the executive branch, in that regard, is a good one. It has always been accepted that only the executive branch is to decide, for example, whether someone is being sought for extradition as a ruse for persecution. That has always been an executive decision. It has never been given to the judiciary, and I am not aware of any case where it has been alleged that the executive has failed to live up to standards of decency in that regard.

I am not aware of any case where anyone has claimed that the executive has turned someone over who is going to be persecuted, and I think that given the track record there that continued faith is justified.

Mr. HUGHES. Should the bill instruct the Federal courts not to hear any evidence on the political offense issue until after the person being sought has been otherwise found extraditable?

Mr. LUBET. That would be appropriate. I think that is the practice.

Mr. HUGHES. And as a practical matter, it would save a considerable amount of time.

Mr. LUBET. It would, and viewed in conjunction with my suggestion that the burden of proof regarding the political offense be placed on the defendant, it would make the hearing very orderly. You would have the first part where the burden is on the Government to show probable cause. Once that finding is made you move to the second part of the hearing where the defendant must go forward with the evidence, if he wishes, in attempting to show that the offense was of a political nature.

Mr. HUGHES. What you are saying in essence is that the defendant has the burden of going forward with the evidence on political, and must establish it is a political offense?

Mr. LUBET. That would be my suggestion.

Mr. HUGHES. Thank you. We appreciate your testimony. Again you have been most helpful to us. We appreciate it.

Mr. HUGHES. Our next set of witnesses will appear as a panel. Each of these witnesses is vitally interested in the question of the political offense exception to extradition requests. The panel consists of persons who have a firsthand knowledge of the application of the political offense doctrine. The panel members are Keara O'Dempsey, attorney, Beldock, Levine & Hoffman, New York City, and Romeo Capulong, member of the Alliance for Philippine Concerns.

We have received copies of your statements and, without objection, they will be made a part of the record. It would be helpful to the subcommittee if each of you would briefly summarize your position on the legislation before us.

Please proceed as you see fit. We will start with Ms. O'Dempsey.

TESTIMONY OF KEARA O'DEMPSEY, ATTORNEY, BELDOCK, LEVINE & HOFFMAN, NEW YORK, N.Y.; AND ROMEO CAPULONG, MEMBER, ALLIANCE FOR PHILIPPINE CONCERNS

Ms. O'DEMPSEY. Let me express the gratitude of the Brehon Law Society for the privilege of sending a representative here today. The Law Society on the basis of its experience has a number of more detailed suggestions to make to the subcommittee. We are very pleased with the change in the bail rules. We are very pleased to find that the subcommittee has chosen to leave jurisdiction in the courts to determine the political offense exception.

Mr. HUGHES. All the things you like, the members up here have finalized. The things you don't like, the staff is responsible for.

Ms. O'DEMPSEY. We are primarily concerned with the redefining of the political offense exception, and also with the lodging of very broad discretion in the Secretary of State as to other issues which are of concern to lawyers representing a defendant in an extradition proceeding.

The redefining of the political offense exception as proposed in the bill (H.R. 5227) would leave, I believe, my own client, Desmond Mackin, extraditable. When we first began to prepare in the *Mackin* case to defend Desmond Mackin, we felt we did bear already an extremely heavy burden in representing a member of a supposedly terrorist organization before a U.S. court, in particular,

given the close relationship that has always existed between America and Great Britain and then their system of common law.

In order to prepare ourselves, we therefore began to research into the history of the political offense exception, trying to discover from whence it came. It appeared to us anomalous. Here was a man accused of a crime. Probable cause would be found undoubtedly. Yet his extradition might be refused.

We found that the political offense exception originated in the philosophy of Thomas Jefferson, George Washington, John Adams, and all of the Founding Fathers who contributed to the Declaration of Independence. The political offense exception exists, then, in the first instance because early-day Americans would have, of course, not wanted to have seen their own Founding Fathers extradited to Great Britain for having taken up arms against that country, for having sought the liberty of this country through violent revolution.

I would like to point out that as the House bill is now phrased George Washington could easily be extradited.

I should make it clear that the Brehon Law Society in no way advocates violence. We are very much at peace and we urge the approval of those portions of the bill which permit extradition for rape, drug offenses, and hijacking. We agree with Professor Bassiouni's suggestion that war crimes should also be included as nonpolitical.

However, we are concerned about the inflexibility of attempting to define more broadly than that what is and what is not a political offense.

I will address briefly the question of burden of proof. My own feeling is that the burden of proof which rests upon any defendant appearing in an extradition proceeding is already extremely high. The government which requests his extradition has all the bona fides of its diplomatic corps and the recognition by our Government of its government. The defendant is accused of a crime. The U.S. executive department is anxious, as a rule, to be rid of him.

I would like to address the shibboleth, I believe that is a fair word, of executive discretion. There is very little literature on how frequent executive discretion has been exercised in favor of an extradition. However, such literature as does exist shows it has never been exercised.

The *Normano* case I think is the best illustration that we could have. To lodge discretion in the Secretary of State to deny extradition would be the destruction of the political defense exception. It is the denial of all humanitarian considerations by our Government.

In the *Normano* case, brought in 1933, Nazi Germany requested the extradition of a Jew. The U.S. courts affirmed that the United States would and could extradite. Mr. Normano took his case to the Secretary of State. The Secretary of State, having power to deny his extradition, declined to do so. He ordered Mr. Normano extradited.

If under those most extremely severe circumstances persons can be extradited from our country, what can be expected from less clear-cut situations? The *Mackin* case, I believe, shows, and particularly the U.S. opinion as well as the court of appeals opinion,

that the courts act extremely responsible, as responsibly in these situations, and in fact more power can safely be granted to the courts.

Let the courts look at the evidence. Let the defendant present his defense. If he is innocent, why should he not be permitted to show that here? Why should he be sent to a court where all the rules will be applied against him, where he will not have the benefit of the presumption of reasonable doubt of innocence? He will not have the benefit of the beyond a reasonable doubt standard.

Our court, in the enforcement of civil court judgments from other countries have often looked at the trial underlying the judgment to see if it comported with fundamental fairness. When we participate in a criminal proceeding where someone may be jailed for the rest of their life, or even executed, why should we grant the defendant less?

As you can see I am here today primarily to bring to the subcommittee's attention the concerns of the defendant. While the defendant is in our country he has the benefit of the presumption of innocence and we must never forget that the man who sits before the court, or the woman, may well be innocent. For that reason the concern of why he is being prosecuted by another country, of what evidence warrants his extradition and of whether he will receive a fair trial after extradition, are all of extreme importance to us.

Thank you.

[The statement of Ms. O'Dempsey follows:]

STATEMENT OF KEARA M. O'DEMPSEY, ESQ.

As a member of the Brehon Law Society, I wish to thank the members of the Subcommittee for providing us with an opportunity to testify today. The Brehon Law Society is a group of Irish-American lawyers in New York City who are concerned with the erosion of due process rights in Northern Ireland and have recently become concerned about the impact of the Northern Irish struggle upon American laws. The Society recently represented Desmond Mackin, a member of the Irish Republican Army, in his extradition proceeding here in the United States. Mackin's extradition was requested by the Government of Great Britain for a clearly political offense; the Brehon Society was successful in defeating that request. Mackin was subsequently deported to the Republic of Ireland, where he now lives as a citizen.

During the course of the fifteen-month proceeding, the Brehon Law Society had occasion to acquire first-hand knowledge of our extradition laws and, in particular, to investigate the history, purpose, and origins of the political offense exception. I am appearing today before you in order to present both the knowledge we have acquired about the political offense exception and to offer our suggestions as to proposed changes in the extradition law, based upon our experience in the *Mackin* case. During the course of my brief talk, I will have occasion to refer to the facts of the *Mackin* case and the law applied there. Since the Mackin proceeding is probably the lengthiest and most detailed extradition proceeding in the past 100 years, I will be happy to answer questions and describe that case in further detail during the panel discussion.

When members of the Brehon Law Society first became aware of the political offense exception, many of us were surprised. The political offense exception prohibits the extradition of those who have committed "criminal" deeds in the course of a political uprising. It seemed to be out of step with our modern criminal laws. The question naturally arose, how did the political offense exception come to be? To find the answer, we began digging into old treaties and dusty cases. We were absolutely fascinated with what we found. I would like to give you at least the flavor of the knowledge that we acquired and the history that we discovered.

We found, first of all, that the political offense exception originates in the same philosophy that gave rise to our own Revolution and to the Declaration of Independence. The Declaration speaks of the proper ends of government, and of the right of a people to abolish its government when that government becomes destructive of their

inalienable rights. The Declaration declares that it is not simply the right—but even the duty—of a people to take up arms against its government after a sufficiently long "train of abuses and usurpations."

The philosophy underlying the Declaration of Independence is the philosophy of the Enlightenment, which was the first widespread Western philosophy to give primacy to the rights of the people as against the power of the government. It is that philosophy that underlies the American Revolution, the French Revolution, and all of the European revolutions of 1830 and 1848.

Having achieved liberty by armed struggle, Americans naturally felt that they could not extradite citizens of other countries who sought to gain for themselves no more than we had already achieved. One eminent scholar has stated that position as follows:

"Modern democratic states could hardly make themselves instruments to fetter the chains of servitude on their brothers by extraditing the brave men who have risen in revolt against a tyrant." [1]

In our early history, the political offense exception did not appear in our treaties for the simple reason that extradition of political offenders was so inherently unthinkable that no written precaution against it was considered necessary. In 1853, our Secretary of State was asked to extradite a political offender. The Secretary unconditionally refused even to consider that request. Secretary of State Marcy wrote to the foreign Ambassador as follows:

"To surrender political offenders * * * is not a duty but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power and an act meriting the reprobation of mankind." [2]

It would thus seem that the political offense exception embodies an integral part of the American philosophy of human rights. It appears that the purpose of the exception is an entirely laudatory one, one that ought never to be ignored or forgotten. It appears that to destroy the political offense exception would be to turn our backs on the tradition of Thomas Jefferson and George Washington, who were both assuredly political offenders of the most deplorable sort in the eyes of sovereign Great Britain. Yet, it has been argued—vociferously argued—to this Committee, and to its counterpart in the Senate, that the political offense exception must be radically changed, because the courts have grossly misused it. It has been argued that the proper remedy is to lodge jurisdiction to apply the exception in the Secretary of State alone. In view of our history and traditions, such a change would indeed be extraordinary. Surely extremely good reasons and the most pressing emergencies must underlie the proposed changes.

Indeed, when we turn to the statements of the State and Justice Departments, we find claims of a "devastating impact" and "crippling effect" on our foreign relations, and on the fight against international terrorism, due to the courts' supposed misuse of the exception. Yet, no examples of such effects are given.[3] State and Justice have also argued that the political offense exception, left in the hands of the courts, leads to atrocious results. What are their examples? The examples, cited over and over again, are only three: the *Mackin* case, the *Abu Eain* case, and the *McMullen* case. I would first of all submit that three cases within a span of thirty years or more do not an emergency make. Such language as "devastating impact" and "crippling effect" could only be justified by broken alliances, refusals to enter into treaties, and round denunciations from other nations whose respect we seek. Yet, neither State nor Justice has provided a single instance of any of these.

It is difficult to believe, then, that any real emergency exists. Perhaps the fault lies in the three cases; perhaps an outrageous perversion of justice is present in one or all of those cases. I would like to briefly describe two of the cases, so that you may judge for yourselves if such a terrible perversion of justice has in fact been committed by the courts of our country.

I will address the *Abu Eain* case first. Abu Eain is a young man, a Palestinian by birth, who was accused by the Israeli government of membership in the PLO and of having placed a bomb in a public marketplace in Israel. The bomb that went off killed two young people and injured others. I do not know, no more than anyone in this room, whether or not Abu Eain placed that bomb in the marketplace. It is

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[1] Stowell, "International Law: A Restatement of Principles," 272-73 (1931).

[2] Mr. Marcy, Sec. of State, to Mr. Hulsemann, Sept. 26, 1853. Sen. Docs., 33rd Congress, 1st Sess., Vol. i, p. 34; quoted in I Moore, J. B., "A Treatise on Extradition and Interstate Rendition," 305 (1891).

[3] In the *Mackin* case, the Court of Appeals explicitly noted that—despite the Justice Department's rhetoric—no evidence of any impending disruption of our foreign relations had been submitted by either side.

surely a horrible crime. But the extradition law of this country, as it stands, strangled Abu Eain's every attempt to place a defense before the court. The evidence against Abu Eain consisted of sworn affidavits by two Arabs in Israel. The original affidavits were in Hebrew, a language unknown to those two witnesses. Those two people have fully recanted their testimony. Abu Eain was prevented by our laws from presenting either defense to an American court.

Abu Eain, 23 years old, was jailed by our country, then put on a plane and sent back to stand trial before a government which he regards as thoroughly unjust and before which, he believes, he has no hope of receiving a fair trial. Our extradition law prevented our courts from even taking up that question. If Abu Eain receives, as he may well receive, an unfair and summary trial in Israel; if he is innocent and will yet be convicted by an Israeli court, our country is guilty of complicity in that wrong.

Desmond Mackin, my own client, is a member of the Irish Republican Army. Desmond testified, at his extradition hearing, that twice as a young boy he and his family were roused out of their beds, in the middle of the night, by armed Loyalist gunmen. The second time the gunmen took the family outside and set the family home on fire. Under the legal system now in effect in Northern Ireland, the Mackin family was helpless in attempting to bring those men to the bar of justice. Mackin joined the IRA precisely to "set aside such a long train of abuses and usurpations." While we may debate the tactics and philosophy of the IRA, we cannot deny his right to do so and still consider ourselves the inheritors of the legacy of Thomas Jefferson. It is for this reason that we in the Brehon Society oppose the re-definition of the political offense exception in the House Bill.

For still other reasons, the Brehon Society urges that courts should be granted the power to inquire into the treatment an extraditee will receive in the requesting country. Again, *Mackin* is a case in point. You may be surprised to learn that, had he been sent to Belfast to stand trial, Mackin would not have been brought before an ordinary English court. Rather he would have faced a special Northern Irish court created to try political offenders. He would not have the benefit of a jury trial. He would have been tried under special rules that permit a conviction and sentence of 25 years in prison without a scintilla of real evidence against him. Mackin would have faced a court in which the Government would have no burden, but where he would have to prove his innocence "beyond a reasonable doubt."

Let us look briefly at the facts of the case of Desmond Mackin, whom the New York Times recently gratuitously labelled a "murderer." [4] Mackin's extradition was requested on the strength of eyewitness statements given by four British soldiers and certain forensic evidence. That would seem to be sufficient in any case to justify a trial, and perhaps a conviction. When I myself first read the evidence, it seemed to me that Desmond Mackin was probably guilty of the offense of shooting a British soldier. When I read the evidence a second time, I began to feel uneasy, sensing that something was wrong.

The members of the Brehon Society submitted the forensic evidence to the former Chief Medical Examiner of New York City. His verdict and assessment of the evidence came back quickly: There was no possibility that Desmond Mackin was guilty. The evidence showed that he had not fired a gun, and that he had not even carried one on the day in question. The evidence also showed that, although eight British soldiers were involved in that shooting incident in Belfast, only one of them had been wounded—and that one but slightly. Yet, Mackin had been shot three times; his friend Robert Gamble, also a member of the Irish Republican Army, had been shot seven times. Each of those seven shots was in Gamble's back. The soldiers shot a minimum of thirty-one bullets at these two men. Although Mackin and Gamble were shot down in broad daylight, no gun belonging to either man was ever found.

If the *Mackin* and *Abu Eain* cases are insufficient to prove the necessity of permitting our courts to look more closely at the evidence, at the motives of the requesting government, and at the type of trial to which we send a defendant, surely the *Normano* case dispels all doubt as to that need. In 1933, the United States was asked by Nazi Germany to extradite a Jew to stand trial in that country.[5] The courts of America refused to examine closely the evidence against him or to inquire into the treatment he would receive in the hands of the Hitler government, explaining that they did not have jurisdiction to do so.

The Secretary of State, although empowered to refuse Normano's extradition, did not choose to do so. The Justice and State Departments now plead that the extradition laws which sanctioned the return of a Jew to Nazi Germany are too liberal and

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[4] New York Times, December 21, 1981, lead editorial.

[5] *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934).

must be tightened. They argue that the discretion that the Secretary of State refused to exercise in that instance should be broadened and made virtually plenary. We ask that in deciding the questions before you, you keep always in mind the possibility of another *Normano*, and take steps to prevent such a shameful result from ever occurring again. The Secretary, to our knowledge, has never once exercised his discretion to prevent extradition for humanitarian reasons. The solution to that is not, as State and Justice urge, to give him more discretion, but to transfer that power to the courts, who will be less afraid to exercise it fairly.[6]

In conclusion, I would like to say that I have read the Statements of other witnesses who have appeared before this Subcommittee, and I have found them sobering indeed. They are sobering not because they prove a terrible, cataclysmic international terrorist conspiracy, and world chaos resulting from it, for they do not. They prove instead that many among us have lost sight of all that has made this country a citadel of decency and a repository of respect for humane and civil libertarian philosophies. I have read, for instance, that extraditees have no due process rights. I have read that, despite our Constitution, no hearing need be given before this country jails a person and sends him, against his will, to another country to stand trial. I have read those Statements and they have caused me to wonder aloud, What country is this?

I have had to pose that question because, for all our faults, our Constitution has stood the longest test of time and has proven the greatest bulwark of human freedom in the history of the modern world. The members of the Brehon Law Society and I, ever mindful of the fragility of human liberty, ask you never to lose sight of the basic rights that are granted to every human being who finds himself within the territory of our nation. We urge you, with respect to each section and subsection of the bill, to look at the text from the point of view of not only the needs of Government, but also the needs and rights of the innocent defendant. It has been the most fundamental principle of our jurisprudence, from time immemorial, to look at any criminal law from that point of view.

Although the needs for effective enforcement of our criminal laws are all too pressing, we as a nation have ever refused to give up our concern for fairness and justice. In particular, when we participate in the criminal proceedings of another country, we ought to take the utmost care to ensure that that participation comports with our highest standards and best philosophies. To those who tell you that we need take heed of the due process rights of persons whom we shall forcibly seize and send to other countries, I would urge you to pose this question—If we, in America, will cast aside due process, who will ever extend it? If we, in America, care so little for fundamental fairness and basic humanitarianism, what have we come to stand for, and who will take our place?

Mr. CAPULONG. Mr. Chairman and members of the subcommittee, my name is Romeo T. Capulong. I am a practicing attorney in New York City and chairperson of the Filipino Lawyers Committee for Human Rights.

I represent the Alliance for Philippine Concerns, a U.S.-based coalition of various organizations and individuals in support of human rights in the Philippines and in opposition to the Marcos dictatorship. Our alliance includes: Church Coalition for Human Rights in the Philippines [CCHRP], Movement for Free Philippines [MFP], Friends of the Filipino People [FFP], Filipino Lawyers' Committee for Human Rights, Philippine American Group-Advocates for Social Action [PAG–ASA], Philippine Education Support Committee [PESCOM], the Alliance for Philippine National Democracy [UGNAYAN], the Association of Progressive Filipinos [APF], the Campaign to Remove the U.S. Bases in the Philippines [CRUSBP], the International Movement for a Democratic Philippines [IMDP], the Philippine Research Center [PRC], the Samahanang Makabayang Pilipino [SAMAPI] and the Sambayanan.

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[6] In response to the Government's implicit contention that the courts acted irresponsibly in the *Mackin* case, I can do no better than refer you to the opinions of the Second Circuit and Magistrate Buchwald. The latter opinion, for example, is 101 pages long and is a model of judicial fairness and scholarship.

On behalf of the Alliance for Philippine Concerns and all its member organizations I wish to thank you for this opportunity to testify.

I am here before you today because the proposed bill—H.R. 5227 would significantly affect millions of people who reside in this country. In particular, I wish to cite its effects on the close to a million member Filipino communities of citizens and noncitizens.

We think that it would be valuable to focus on the Philippines as a case study to show how the proposed act—unless drafted with strong protection against political abuse—would allow a repressive foreign government to abridge the constitutional rights of persons living in the United States.

The Philippine situation makes an excellent case study because, at present, the Marcos government has already filed a criminal conspiracy case against and has announced its intention to seek the return of 41 anti-Marcos political oppositionists residing in the United States.

This case is part of an attempt to silence and intimidate the members of the political opposition living in the United States. While his critics originally dismissed the Marcos charge as no more than political slander and a means of keeping them out of the Philippines, recent developments are now giving them a cause of serious concern. Last November 27, the U.S. Government initialed an extradition treaty with the repressive regime of Mr. Marcos and this treaty is now up for ratification in the U.S. Senate.

This treaty, as presently constituted, if reinforced by an Extradition Act that is without judicial protection against political abuse, will surely provide the dangerous instrument by which political critics of Mr. Marcos living in the United States will be delivered to his repressive government in violation of their rights under both the U.S. Constitution and international law.

It is also important to emphasize, in this connection, that Mr. Marcos has arbitrarily passed martial law decrees which practically convert all political offenses into "criminal acts." This has resulted in his continued and vehement denial, when confronted with documented charges of human rights violations of political prisoners [see Amnesty International's Report on the Philippines, 1975], that there are no political prisoners in the Philippines but only common criminals charged with violations of specific penal laws.

The criminal charges against Marcos' U.S. critics have already been filed in the Court of First Instance, Quezon City, Philippines. The Marcos government's announcement of its intention to seek extradition was widely reported in the Philippine newspapers [Bulletin Today, January 5, 1982].

This criminal conspiracy case targets almost all the top leaders of the different anti-Marcos groups organized and existing in the United States, charging them with one vast "conspiracy" to overthrow the Philippine government by "assisting" and "supporting terrorist activities" in the Philippines.

This conspiracy charge is patently false and political. Many organizations involved are church-related and nonviolent as a matter of moral and organizational principle. In addition, there can be no so-called conspiracy among these groups because of widely known differences among them. For illustration, those charged include per-

sons such as former Senator Benigno Aquino, now teaching at Harvard University, and former Senator and Foreign Minister Raul Manglapus, well-known Marcos critic and occasional columnist for the Washington Post.

At present then, the Marcos government has already announced its intent to politically abuse the extradition process and has taken the initial steps to carry out this abuse.

It would seem that a concern of this subommittee is to draft extradition legislation which, to the greatest extent possible, protects against the type of political abuse impending from the Marcos government—and which may be engaged in by other foreign governments in the future.

What are the major weaknesses of H.R. 5227 which would allow the Marcos government to abuse the extradition process for his own political purposes? We feel they are as follows:

One, extraterritoriality—the present statute governing extradition to foreign countries in general requires that the alleged offense be committed in the geographic territory of the demanding state. The specific language of the current law, 18 U.S.C. section 3184, allows extradition of persons charged with ". . . having committed within the jurisdiction of any such government any of the crimes provided for by such treaty. . . ."

H.R. 5227, section 3191 leaves out this provision entirely. While H.R. 5227 does not expressly authorize extraterritoriality, its elimination of the above provision from present law will be interpreted as contemplating and authorizing extraterritorial jurisdiction of a demanding state.

Extraterritorial jurisdiction always infringes on the sovereignty of another country. And, in the area of extradition, involving as it does foreign criminal law, the infringement on sovereignty can be pervasive. Basically, extraterritoriality under H.R. 5227 will cause speech and conduct occurring entirely within the United States to be regulated by the criminal laws of foreign countries.

Why the United States would wish to allow the criminal law of foreign countries to regulate speech and conduct occurring entirely within the United States is difficult to understand.

That some foreign countries will seek to extradite persons for speech and conduct occurring solely in the United States is clear. For example, a substantial number of the 41 persons already charged in the Philippines and whose extradition Marcos has announced he will seek, are charged with alleged speech and conduct that occurred entirely in the United States.

Extraterritoriality introduces a major conceptual change in present extradition law. It provides the basis for extreme political abuse—as is illustrated by the actions and stated intentions of the Philippine dictator. We strongly urge that H.R. 5227 expressly restrict extradition to persons alleged to have committed offenses within the territorial jurisdiction of a demanding state.

Two, conspiracy—H.R. 5227 at section 3194(e)(2)(viii) includes as an extraditable offense the crime of conspiracy. The inclusion of conspiracy, when coupled with the allowance of extraterritorial jurisdiction, is the aspect of H.R. 5227 ready made for political abuse by foreign governments, such as the Marcos regime in the Philippines. Thus, extraterritoriality is the concept, and conspiracy is the

mechanism, for it allows the demanding country to reach into the United States and secure the return of its critics abroad even though those critics may never have been actually or constructively present in the territory of the demanding state during, or for years before and after, the time period when the conspiracy is alleged to have existed. This is, in fact, the situation with most of the 41 charged in the Philippines against whom Marcos intends to demand extradition. They were in the United States during the entire period during which a conspiracy is alleged to have existed.

Extraterritoriality coupled with a conspiracy charge thus makes it possible for speech and conduct occurring entirely in the United States to be subject to trial, conviction, and punishment in foreign courts. The chilling effect of this on the exercise within the United States of first amendment rights cannot be overemphasized.

As an example, former Philippine Senator Raul Manglapus was out of the Philippines when Marcos declared martial law in September 1972. Senator Manglapus settled in voluntary exile in the United States. He has not returned to the Philippines. He has been an outspoken critic of the Marcos government from abroad, frequently criticized Marcos in columns in the Washington Post and the New York Times and has been a leading force in building public sentiment against the Marcos government both within and without the Philippine community [over 800,000] in the United States. Now the Marcos government has filed criminal charges against Senator Manglapus in the Philippines and has announced its intention of seeking his extradition.

By alleging that Senator Manglapus' speech and conduct within the United States constituted participation in a conspiracy in violation of Philippine criminal laws and by invoking extraterritorial jurisdiction, the Marcos government will demand U.S. assistance in bringing Senator Manglapus within its grasp. On the surface such a development would seem incredible. Unfortunately, H.R. 5227 allows and authorizes such a development and, as stated earlier, Marcos has already filed the criminal charges and announced his intention of demanding extradition of Senator Manglapus—as well as some 40 others.

We strongly urge that the ability of Marcos and others to reach across the sea through wide net conspiracy charges and force the return of its critics be eliminated from H.R. 5227. This can be done through restricting extraditable conspiracy offenses to those in which the alleged conspiracy exists and is allegedly participated in within the territory of the demanding state, or, as stated above, by simply prohibiting all aspects of extraterritoriality from H.R. 5227, or by doing both.

Three, absence of political offense prohibition and failure to place determination with the courts—H.R. 5227 does state that any issue regarding a political offense is to be determined by the courts. However, the inclusion of this provision, section 3194(e)(1)(B)(2) in H.R. 5227 makes it clear that such an issue exists only if the treaty in question raises such an issue. In other words, if the treaty does not have an exception to extradition for political offenses, then the courts have no issue to determine.

Second, if the treaty in question excepts political offenses from extradition but specifically states that determinations regarding

political offenses are to be made by the executive, it is doubtful, given the language of H.R. 5227, if the courts would consider this to be an issue raised [for the court] by the treaty. Nowhere does H.R. 5227 state that persons cannot be extradited for political offenses. It states only that if the treaty raises any issue of political offenses, then the court will determine if it is a political offense.

The need for a political offense exception is great to prohibit foreign countries from utilizing U.S. legal process to strike at its political opponents abroad. The need for the courts to determine this issue is to remove it from the pressures, potential embarrassments, objectives, and so forth, of U.S. foreign policy which are concerns of the executive and also from the shifts in foreign policy concerns that occur within the executive with changes in administrations.

Other reasons why this should be a judicial determination instead of one made by the executive is that if judicial, it is public and subject to media scrutiny, the person arrested can present witnesses and other evidence and insure that a considered judgment on the merits will be made, and, importantly, appellate review is available. In addition, it should be pointed out that a judicial determination of extraditability does not preclude the executive, in its discretion for whatever humanitarian or foreign policy aims it wishes to accomplish, from refusing to extradite the person.

The doctrine of judicial determination of political offenses in extradition cases has been recognized in this country as early as 1852 when the United States was not yet a global power and did not wield as much influence as it now has over the peoples of other countries. In the case of "In Re: *Kaine*", 55 United States p. 113, decided by the Supreme Court that year, it was held that "extradition without an unbiased hearing before an independent judiciary is highly dangerous to liberty and ought never to be allowed in this country." Significantly, the Court in this case cited with approval the earlier case of *Robbins*, decided in 1799, which held that an otherwise extraditable crime is "thought to be rendered nonextraditable by the circumstances surrounding its commission and the motives of the offender."

We cited the above precedents to underscore the fact that the doctrine of judicial determination of political offense questions is deeply enshrined in the American legal system and consistently adhered to in a long line of decisions in the interest of individual liberties. This time-honored doctrine has acquired an added validity and relevance in the present time when we consider U.S. global interest and influence in the Third World and the millions of political dissenters and oppressed peoples in such countries some of whom have sought sanctuary and have been accepted in this country for valid humanitarian, legal, and moral grounds.

Indeed, in light of present day political realities, the doctrine and the historical expansive process in its application instead of being abrogated or reversed as the pertinent portions of the proposed amendments seek to accomplish, should be strengthened by legislative and judicial support against executive encroachment.

In a broader sense, the Philippine case illustrates the inherent danger when attempts are made to transform a judicially safeguarded, politically neutral extradition process into a foreign policy instrument, subject to all its attendant political shifts. At stake, of

course, would be the constitutionally guaranteed rights of residents in this country.

For all of the above reasons it is extremely important that H.R. 5227 contain an express prohibition on extradition for political offenses and that it be expressly stated that the courts make the determination.

In conclusion, I would like to bring to the committee's attention a concept of jurisprudence outlined many years ago by Justice Oliver Wendell Holmes. I refer to his concept of the "bad man" theory of law. Law should be formulated, Holmes said, with the "bad man" in mind—because it is the "bad man" who requires the regulation and control of the law, and it is from the "bad man" that the rest of society needs protection.

Allow me to suggest to the subcommittee that in the extradition area it is the "bad government" or, more accurately, the "bad leader" that should be kept in mind when extradition legislation is promulgated. And, as I hope this case study of the Marcos regime's announced intention to politically abuse the extradition process has illustrated this concern is a very real and immediate one.

Mr. HUGHES. Thank you very much, Mr. Capulong.

Mr. Sawyer.

Mr. SAWYER. As I have been reading and listening to your statement concerning the British soldier, you depended heavily on evidence that he was not guilty of the offense with which he was charged. Suppose there was no real contest about his guilt and that he was clearly guilty. Would that have changed your view on the extradition?

Ms. O'DEMPSEY. No, it would not. I don't believe it would change Desmond Mackin's position within the tradition and history of this country, et cetera, concerning political offense.

Mr. SAWYER. I don't remember the history of the incident involving the shooting of a British soldier out of uniform, who was alleged to be standing and waiting for a carriage or a bus or something like that. Let's assume he was guilty.

Ms. O'DEMPSEY. The soldier himself and the soldiers on his patrol admitted they were on plainclothes duty, intelligence gathering duty in an entirely Catholic section of Belfast where they know they are regarded as enemies and not as friends. They were all heavily armed. They were recognizably British soldiers, and so to describe them simply—he was not standing at a bus station waiting for a bus. He was standing at a bus station to see what movements were being made by IRA men and their supporters in the vicinity.

Mr. SAWYER. One of the things that bothers me—and I don't know quite how you avoid it—is how we distinguish this blatant, senseless terrorism from criminality by giving it a political label. In my mind, it is not very political. I don't have much sympathy with this kind of conduct, as opposed to something in the way of a political revolution. This involves shooting or blowing up some relatively innocent person.

If I was a judge, I would have to confess that I would be rather loathe—unless I was compelled by pretty strong precedent—to decide that was political activity as opposed to downright senseless murder.

Ms. O'DEMPSEY. Assuming, as we in the Brehon Society do, and the Framers of our Declaration and Constitution did, that after a sufficiently long train of abuses and usurpations, a people who are not granted their inalienable rights have the right to take up arms. Assuming that, and assuming that they are faced with a government as is true in Northern Ireland, as is true in the Philippines, which is almost omnipotent, in terms of tanks, self-loading rifles, Land Rovers, 15,000 or 20,000 troops, whatever, guerrilla war is the form of revolution that is turned to.

Guerrilla war does look different to the newspaper readers 3,000 miles away than a conventional war. But, in fact, it has the same goal; it has the same means.

Mr. SAWYER. How do you feel, for instance, about the extradition of IRA members who blow up department stores occupied primarily by women shopping, with children? How do you feel about that?

Ms. O'DEMPSEY. My own feeling about that is that I find that myself, on the face of it, on the facts that you give, a repugnant and reprehensible crime. I would want to know more facts about it. I would want to know why the department store was considered an appropriate goal.

Most importantly, I would want to know, was this a warning given to the people in the department store? My understanding is, and the testimony was received at Desmond Mackin's hearing, that the IRA policy has a policy always of giving warnings whenever civilians are to be endangered by placing of a bomb. The same is not true when soldiers are expected to come into contact with the bomb. As to civilians, warnings are always given.

Mr. SAWYER. Well, if they weren't, you would then see no good argument that it was political and they ought not to be extradicted.

Ms. O'DEMPSEY. On the bare face of the facts as you describe them, my tendency would be to feel that that was an extraditable crime. As I say, I would give the defendant certainly an opportunity to testify and present evidence showing why the court should consider that a nonextraditable crime.

Mr. SAWYER. Well, you know, all of my ancestors were Irish, but I must also confess that this kind of willy-nilly blowing people up other than in what I would consider a somewhat legitimate war-type setting, does not generate my sympathy.

Ms. O'DEMPSEY. Mr. Sawyer, I would like to suggest that we are not ordinarily presented with the side of the IRA in our daily newspapers. We are presented with the side of the government, for the most part.

The IRA must remain a secret organization, because sheer membership is proscribed. You can be put in jail for 5 years for being a member of the IRA. They are not free to come forward and speak. Were they free to come forward and speak, was Shim Phane free to come to this country, perhaps we would understand that situation better and find that the IRA was carrying out its war in an honorable means. From my own sources, I suspect that that is true.

If I may add, Mr. Sawyer, if you ever should have occasion to attend the demonstrations in New York or in our other large cities, San Francisco being one, Chicago being another, you will find that there are people born and brought up in Northern Ireland who

regard the British soldiers in that country as terrorist, those who employ random violence against defenseless people—not the IRA.

Mr. SAWYER. I am sure.

I yield back the balance of my time.

Mr. HUGHES. Mr. Hall.

Mr. HALL. I notice that—which is certainly all right—that both of the witnesses here today, one professes to take up the standard for the IRA and the other proposes to be against a Marcos government, and their testimony is pretty much buttressed in that position.

Ms. O'DEMPSEY. Mr. Hall——

Mr. HALL. A moment ago you didn't state what position you took as to burden of proof in one of these cases, Ms. O'Dempsey.

Ms. O'DEMPSEY. Mr. Hall, if I may, I do not wish to appear before the subcommittee as a representative of the IRA. I am not a representative of the IRA. There is a great deal I do not know about the IRA. There are things about the IRA I am troubled by.

I am still more troubled by the policy of the British Government in Northern Ireland, which does have the power to change things, which the IRA seems to lack. I am concerned about——

Mr. HALL. You cannot have but one government in a country. You cannot have two governments operating in opposite directions. I am not here to really hear anything dealing with a propaganda approach either way from either witness.

You have a position as to where the burden of proof would rest in a case such as we have reference to here today. Would it rest with the defendant or the person they are attempting to extradite or on the U.S. Government?

Ms. O'DEMPSEY. I think that it is fair for the most part that the defendant should have the burden of proof. There are times when the government's complaint, or the complaint presented to the U.S. Government, is so drawn that the political offense seems obvious. I believe that was true in Desmond Mackin's case.

The complaint said British soldiers were standing around gathering intelligence. They recognized Desmond Mackin as a member of the IRA. A shooting incident broke out. It seems clear that that——

Mr. HALL. Did you ever see a bill of indictment drawn showing the defendant was not guilty?

Ms. O'DEMPSEY. The British Government's position was that this was an ordinary crime and had no political overtones; that the political offense exception was not applicable. Yet its own complaint shows that the reason these two men came to blows, or to exchange shots, was because they were members of opposing enemy forces.

Mr. HALL. When you have a matter such as this on extradition, what do you believe and what do you feel, as an attorney, is the depth to which the case must be tried on its merits at the time of the extradition proceeding? Or do you have certain procedural matters that you are only concerned with and not so much the guilt or innocence of the person who is there seeking to extradite?

Is it your position that you must get into the full-blown evidence as to guilt or innocence of this prospective defendant in a foreign country?

Ms. O'DEMPSEY. I think this country should have substantial reason to believe that a defendant is guilty before this Government sends him back to another country, and particularly where this country sends him back to face trial before a court that is set up especially to receive him, before a court not used in ordinary cases but is set up specifically to deal with a political situation.

Mr. HALL. You are dealing now with the internal affairs of another country, when we say that they have structured their court system in such a way that it is unfair to a person or group of people.

Now, do you believe that the U.S. Government should interject itself into the procedural affairs of a foreign country dealing with its judicial system?

Ms. O'DEMPSEY. I don't believe the United States should interject itself. I don't think that that is necessary.

Mr. HALL. Isn't that what you just said was happening over there; they had set up special courts to take care of these people, which we should not allow to exist, in the desire to allow someone to be taken back to that country and be tried before that special court? Isn't that the end result of what you are saying?

Ms. O'DEMPSEY. I am saying it is not clear to me we should participate in that type of criminal proceeding by providing that person to that court. What I am trying to suggest is that, as Americans, we have values other than international comity, other than the smooth running of extradition procedures.

We have values such as due process. We have a prohibition against cruel and unusual punishment. We have a belief in fundamental fairness. When we send somebody to stand trial in a court that, under our standards, is nowhere near fundamentally fair, it seems to me we are acquiring some taint of that proceeding.

Mr. HALL. Suppose the United States took the position that in Great Britain, merely because they do not have a grand jury system whereas we do, that that is something patently bad about their system; therefore, we should not allow anybody to be extradited because a grand jury there did not return a bill of indictment as we know it in this country.

Do you think that that would be a position that the United States could take because we do not agree with the internal affairs of their judicial or criminal law system?

Ms. O'DEMPSEY. It does not strike me that that is so much a part of anyone's even primitive notion of fundamental fairness that we should object to that. No.

Mr. HALL. Do I understand that you are agreeing—and I appreciate the manner in which we are discussing this issue. Do I understand from your testimony, and you dealt primarily with the IRA situation, do I understand you to say that any of the people in Northern Ireland who are members of the IRA and who commit an offense which would cause them to be tried before this special tribunal should never be extradited from any country, whether it be the United States or any other country, back to that environment?

Ms. O'DEMPSEY. Let me say first that I admire the question. That would certainly be a very hard position for the United States to take, yet those courts are especially geared to conviction. The person who is brought to those courts has very, very few rights.

The burden is on him to prove himself innocent, and as a member of the IRA he is most unlikely ever to be regarded as innocent.

Mr. HALL. We have special court martials in the United States that puts the presumption of guilt on the defendant until he can prove his innocence.

Ms. O'DEMPSEY. That is a situation in which the——

Mr. HALL. I don't agree with that, but that is the way it has been for generations.

Ms. O'DEMPSEY. But overall, even those court martials are not the same as our ordinary civilian courts. At the same time, they are governed in a broad way by the Constitution.

Mr. HALL. Well, as long as these special courts exist, you would have some difficulty in ever having anyone extradited back to that country to be tried for any offense.

Ms. O'DEMPSEY. If he is being sent to one of those courts because he is a member of the IRA, I would have substantial problem with that. At a minimum, I think Americans should be troubled by it.

Mr. HALL. All right.

Ms. O'DEMPSEY. I would like to think that I did not address my spoken testimony simply to the IRA, but also I hope that I did make a substantial point about the *Normano* case, and from the first time I heard of it, it has haunted me. The fact that our extradition laws are so loosely structured that they permit so much discretion and so little accountability that we would be willing to extradite a Jew to Nazi Germany I find absolutely appalling.

Mr. HALL. I must agree with you with reference to that.

Ms. O'DEMPSEY. It could happen tomorow.

Mr. HALL. Is that case the prevailing opinion today?

Ms. O'DEMPSEY. It is the only case I know of of its kind. But after that case was decided, no changes were sought by the Justice Department in our extradition law.

Mr. HALL. Of course, we have had a lot of things happen here that I am not proud of, or maybe you are not proud of, but I don't think we can take one isolated instance and deem it the integrity of the Nation. I don't think you are saying that.

Ms. O'DEMPSEY. No, I am not.

Mr. HALL. Thank you very much.

Mr. Chairman, if I may go right to the next witness and ask the gentleman about one thing that you state, and I asked the staff about this because it concerns me if what you say is true, I am looking at page 5 of your statement, at the top, about the extraterritoriality of this article of H.R. 5227.

You say it introduces a major conceptual change in present extradition law, and you say that you urge that H.R. 5227 expressly should restrict extradition to persons alleged to have committed offenses within the territorial jurisdiction of a demanding state.

You go on with conspiracy and at the bottom you talk about the Filipino senator who was out of the Philippines, not even in the Philippines when Marcos declared martial law in September of 1972. After he came to the United States, you say he made certain declarations which were printed rather widely in the Washington Post and New York Times. You say that as a result of what he has said here that the Marcos government has filed criminal charges

against him based on what he has said and done in the United States.

Mr. CAPULONG. Before I answer the question, this specific question, Mr. Hall, I would like to restate in a nutshell the position which we have presented here.

First of all, we believe that insofar as redrafting the proposed amendments to the U.S. Extradition Act, and for that matter in entering into any extradition treaty between the United States and any particular country which belongs to the Third World, we believe, Mr. Hall, that due consideration should be taken of the fact that in many Third World countries like the Philippines you have basically a legal system which is incompatible with the legal system in the United States.

You have in the Philippines a repressive regime that has a legal system and value system that ignores basic rights and liberties of its citizens, particularly the political dissenters.

Mr. HALL. If you will allow me to interrupt, that is not the question I asked. The question I want to know is, is it your interpretation of the bill, H.R. 5227 that it would allow the Marcos regime to extradite that senator, that representative who is in the United States, for statements and acts that that person committed in this country?

Mr. CAPULONG. There may be such an interpretation.

Mr. HALL. I don't read it that way.

Mr. CAPULONG. There may be such an interpretation arrived at especially if supportive provisions are included in the treaty involved because of the conspiracy provision and the extraterritoriality provision, because there is such a danger that such interpretation may be arrived at, Mr. Hall, because——

Mr. HALL. You are not saying that if this senator had manifested himself in such a way in the Philipppines to concoct a conspiracy aginst the Marcos government and then came to the United States that that would not have been a case for extradition, are you?

Mr. CAPULONG. I beg your pardon? If the acts were committed——

Mr. HALL. My question is: You are not taking the position that if this representative or senator made all of these statements and performed these acts which would amount to a conspiracy in the Philippines and then came to the United States, that he would not be subject to extradition?

Mr. CAPULONG. He would not be subject to extradition, Mr. Hall. If this situation or activities would fall within the concept or definition of a political offense, in this case Mr. Manglapus is a very outstanding critic of the Marcos dictatorship and most of the activities undertaken by Mr. Manglapus and other dissenters of the Marcos regime are within the purview of the political offenses and, therefore, should be excluded from extraditable offenses.

What we are asking, Mr. Hall, is in the redrafting of the extradition law of the United States, I think, due consideration should be made of such situation obtaining in the Philippines. There must be strong political offense provisions both substantive and procedural so that Third World political dissenters would be beyond the reach of the repressive legal systems obtaining in their home countries.

Mr. HALL. Can you think of any situation where a person could be or should be extradited from the United States back to the extraditing country for acts that amounted to a conspiracy in this country and also a conspiracy in the demanding country?

Mr. CAPULONG. That is precisely an objectionable feature, your honor, of House bill 5227, where it may allow for the extradition of a political offender even if the speech or conduct has been committed within the territory of the United States.

Mr. HALL. Suppose we had had an extradition treaty with Cuba during the Bay of Pigs? We don't have an extradition treaty, but suppose we did, and say we had all the Bay of Pigs people getting ready to go back and invade Cuba, kill Castro and take over the government. If Castro had asked the United States for extradition proceedings on those people, do you think that the United States should have allowed those people to be extradited back to Cuba?

Mr. CAPULONG. Well, I am not familiar with the political and legal system obtaining in Cuba at the moment.

Mr. HALL. There isn't much to it, Mr. Capulong.

Mr. CAPULONG. If the legal system in Cuba is similar to the legal system in the Philippines——

Mr. HALL. Suppose that same situation had happened in the United States, that your Senator had come here and was trying to recruit people to go back and invade and take over the Marcos regime and install themselves as leaders of that government.

Do you think then that that country should have the right to extradite these people over here?

Mr. CAPULONG. The situation is where a group of people would invade, for example, a country like the Philippines?

Mr. HALL. Yes.

Mr. CAPULONG. And who would be the——

Mr. HALL. Your Senator would be the flag bearer.

Mr. CAPULONG. Excuse me?

Mr. HALL. Your man, whatever his name is—I can't pronounce it.

Mr. CAPULONG. Mr. Manglapus.

Mr. HALL. Yes. Say he came over here and got a group of people together to go back and invade and take over the Marcos government, take over the Philippine Government. Do you think that the Philippines would have the right to ask us to extradite those people back to the Philippines?

Mr. CAPULONG. I think that is one of the major reasons which has been dealt with in many of the cases decided on the political offense question. It would all depend on whether, if we may call it invasion, or the group is pursuing a legitimate political objective.

Mr. HALL. Do you think that would be a legitimate political objective, to overthrow a government?

Mr. CAPULONG. Well, the circumstances will have to determine that particular situation, Mr. Hall. But——

Mr. HALL. All right.

Mr. CAPULONG. But I know for a fact that in the Philippines what is going on is a just and legitimate struggle of the people, and those engaged in the struggle are not terrorists.

Mr. HALL. All right.

Mr. CAPULONG. Not in the sense in which this term should be understood.

Mr. HALL. Thank you very much.

I yield back the balance of my time.

Mr. HUGHES. I just have a couple followup questions.

Mr. Capulong, I think perhaps you have misread the legislation somewhat. We do require dual criminality under the bill as drafted. In order to be extraditable, the offense has to be an offense in the country seeking extradition and an offense in this country. That is the first thing.

I think that particular fact has been lost sight of to some extent because some of the scenarios you have described would not be an offense in this country and so, therefore, would not be subject to extradition unless the treaty otherwise provided. That is the first thing.

I also question the statement that was raised by Mr. Hall, at the top of page 5 dealing with extraterritoriality introducing major or conceptual change in present extradition law.

The present extradition law refers to the jurisdiction of the requesting jurisdiction. It doesn't refer to territorial jurisdiction, so it doesn't say that, in fact, the offense has to be committed within that jurisdiction to be extraditable under our laws.

Now, this country claims extraterritoriality. In fact, we are in the process now of marking up legislation that would extend, pursuant to treaty, this country's jurisdiction to cover Americans who are overseas involved in acts of nuclear terrorism, to aliens who are engaged in that where we can exercise jurisdiction beyond our own immediate territorial seas.

So we exert tremendous territorial jurisdiction, as do many other countries. Sweden probably is as liberal in exercising extraterritorial jurisdiction as anybody. So it is not a novel thing that we are doing.

I understand what you are saying. I think that your criticism probably is more directed at the treaty that was just initialed more than anything else. We have no control over the negotiation of treaties.

Mr. CAPULONG. If I may recall the provisions of the recently concluded extradition treaty, Mr. Chairman, between the Philippines and the United States, I think there is an enumeration there of extraditable offenses and I think concurrence of definition is not required. Now, if that clarification is part of the interpretation, I stand corrected on that point.

Mr. HUGHES. We understand your concerns. I want to tell you, I know I speak for all members of the committee when I say that we feel very strongly that this country should, I think, be very careful in negotiating treaties to be certain we are not entering into treaties with repressive regimes where these very basic rights that you describe are being abused. But we are only implementing treaty legislation, and you may have heard the questioning earlier.

I think we would be overstepping our bounds if we undercut, in effect, what is a responsibility of the President to negotiate treaties and the Senate to ratify treaties.

To look beyond the good faith of countries that are new and negotiating treaties I think is overstepping the bounds of our responsibility.

Mr. CAPULONG. That is the reason why we sought this opportunity to be heard, Mr. Chairman, at least on a few aspects of this bill, because we believe that the interest of Third World people where there is a legitimate struggle for a just and humane society should be seriously considered, lest the political offense provisions of the act or of any treaty be used as an additional handle or tool of our dictator with which to reach out to his enemies beyond the borders of the Philippines, which is actually being done now.

Even before the treaty has been ratified by the U.S. Senate, Mr. Chairman, Marcos already announced that he intends to seek the extradition of 41 so-called common offenders when in fact in the Philippines they are the leading opposition leaders.

So, Mr. Chairman, we believe that if the treaty between the United States and the Philippines as concluded now is not redrafted and if there are provisions in the House bill 5227 which are expressly supportive of the objectionable features of that treaty, we believe that Mr. Marcos would be able to use this to reach out to his political enemies who are in this country at the present time.

So these are all political and legitimate political dissenters, and they are not terrorists, Mr. Chairman. Unfortunately, Mr. Marcos has a different perception of terrorism, and he had classified what are obviously political offenses as common offenses in the Philippines today.

As a recent example, we would like to point out a recently passed law, cabinet bill No. 42 by the rubber-stamp parliament of Mr. Marcos which had declared all positions in the Philippine judiciary vacant except the positions of justice in the highest court, and in another constitutional court.

It is very clear there can be no independent judiciary in the Philippines. This is basically a concept that is seriously incompatible with the U.S. legal system. So what would be started in the Philippines, as a clearly sham proceeding, to prosecute the enemies of the regime, any extradition process here may be a mere continuation of such sham proceedings initiated in the Philippines.

Mr. HUGHES. I share your concern. I think most of your comments should be directed to the other body, the Senate which has primary responsibility for ratifying treaties. You impress me as a good lawyer. You understand the separation of powers, and that happens to be at the heart of the problem we are grappling with.

My suggestion would be for you to direct your concerns to the Senate in connection with their ratification of the treaty.

In the final analysis this country should be very hesitant about entering into treaties with countries that do not respect basic human rights. I am not singling out any particular country, but I make a general proposition.

The second thing I want to point out is, we received an awful lot of mail and a lot of telegrams from folks around the country who believe that the legislation is denying the courts the responsibility for rendering a decision. And as you well know, this bill does not in fact take away the responsibility from the court and vest it in the Department of State.

This bill has, in effect, left the law as it presently exists—the courts make these decisions on the basis of facts presented, and what we have tried to do is provide some guidelines and some appeal mechanism so that we can have due process. That is something I am sure you would agree is probably going in the right direction. You would have the courts render these decisions?

Mr. CAPULONG. We will address ourselves to the proper forum in the ratification of the United States-Republic of the Philippines treaty. We hope the U.S. Senate will give us such an opportunity to address ourselves to that matter.

Let me point out at least in some salient points, Mr. Chairman, similarities in reference to the political offense provisions of the United States-Republic of the Philippines extradition treaty and the provisions of the Senate bill 1639 as well as House bill 5227, in some respects they all contain objectionable features in political offense questions.

Mr. HUGHES. I don't know how you can say that. The Senate approach is altogether different. The Senate would vest inherent authority in the Department of State to make that decision. It is an altogether different approach. We have left the authority with the courts, and we endeavor to try to provide, as I have indicated, the mechanisms of due process on individuals requested by other jurisdictions.

Mr. CAPULONG. There are some provisions in this bill that may expressly support an objectionable feature of the Philippine Extradition Act with the United States, on the treaty with us.

Mr. HUGHES. You understand we are drafting legislation that will address itself to all treaties, not just to the Philippine treaty. It may very well be that I would share your concerns with regard to the Philippines' treaty and, too, maybe if I was sitting on the Senate side I might be very upset by some of the things that you have indicated here today. That is the proper province of a President and the Members of the Senate to take that into account when we decide whether we want to enter into a treaty with another country.

It seems to me one of the very basic issues that have to be decided by our Government in negotiating a treaty is as to whether basic human rights are accorded, whether or not individuals will receive a fair trial and that basic due process will be accorded. Those are things that have to be determined by the executive branch of the Government and by the Senate.

I yield to the gentleman from Michigan.

Mr. SAWYER. I have one or two observations. As I observed earlier, I don't purport to be an expert in international law. However, as illustrated by prisoner transfer treaties, there are elements relating to these international issues that are not on quite the same footing as similar domestic situations.

For example, no country, I discovered, would be willing to enter into something like a prisoner transfer treaty if it would confer upon another country the right to have its judiciary comment on or pass on the adequacy of the justice administered under the laws of that country. In order to enter into such treaties, we had to agree that when prisoners were transferred, even though they may be our citizens coming back, our courts would have no jurisdiction to

review or reverse the final judgment that had been rendered, no matter in that country.

In no way would they agree, nor would we agree, on the other hand, to confer on a foreign jurisdiction the right to apply their standards to our justice.

It strikes me those are the kinds of considerations you have to build into this problem.

Also with respect to the Philippines, I notice that a member of the alliance is the Campaign To Remove the United States Bases in the Philippines. Well, we have to be a little realistic, too, it strikes me. If one of your people, after trying to blow up an American military base in the Philippines, fled to the United States after perhaps killing a few Americans who were there, as part of a political protest, and the Philippine Government wanted to extradite him, I think it would be a little unrealistic to expect our courts to protect the Campaign To Remove the United States Bases in the Philippines by saying, "Well, this fellow blew up some U.S. soldiers in the Philippines because he was politically protesting and therefore we will give him asylum here." I think you have to bring some realism to the international aspects of this thing in addition to what we feel is domestic justice.

Mr. CAPULONG. On the first point, Mr. Sawyer, we are not suggesting that this subcommittee or any agency of the U.S. Government should make a value judgment on what is going on in the Philippines today with regard to its legal system. For example, what we are saying is—I believe it is only fair that we bring to the attention of the subcommittee that is considering legislation with far-reaching implications what our position is, there are some features of the proposed amendment which may be utilized by an oppressive regime to seek out its political enemies.

We are not asking the subcommittee to make an official condemnation of the human rights policies and conditions in the Philippines. Although I think there is enough basis for condemning the record of the Marcos dictatorship in many areas, especially in the area of human rights and suppression of civil liberties.

On the second point, Mr. Sawyer, this is a very complex question. Some Americans believe—some leaders of this country believe that the American bases should remain in the Philippines. Some disagree with that, Mr. Chairman. And Mr. Sawyer, I did not come here to defend our position on this question.

Mr. HUGHES. You are saying within the Philippine-American community in this country there is a division on that score?

Mr. CAPULONG. I should say so, Mr. Chairman. I should say so. Even in the Philippines.

Mr. HUGHES. Let me just conclude the hearing by saying that I share many of your concerns. We are not only talking in terms of possibly extraditing aliens in this country but we are talking about extraditing Americans. We want to make sure that whatever protections are built in are very basic protections, and we will be sure basic due process is accorded.

I think we are all interested in approaching it from that vantage point. We will certainly take a look at your testimony and your recommendations. I am not so sure we are going to have additional hearings, but we have heard a lot of testimony on these very diffi-

cult issues. Frankly, I am very sensitive, as are I am sure most Members of the Congress, that we don't overstep our bounds. We are called upon to pass enabling legislation. We are not here to pass upon treaties. That is the province of the President and the Senate, but we want to come up with the very best enabling legislation, legislation that carries out the treaties, to make sure basic due process is accorded individuals in this country. So from that vantage point we are all working in the same direction.

We appreciate your testimony and we hope that you will convey to those in your organization who are writing to us that in fact the tack this subcommittee has taken is one to vest in the judiciary that right to review, not to give it to the Secretary of State as has been requested. As of yet that question is still open. The legislation itself retains in the judiciary that right of review on extradition.

Thank you. We appreciate your testimony.

[The statement of Mr. Capulong follows:]

STATEMENT OF ROMEO T. CAPULONG, ESQ.

My name is Romeo T. Capulong. I am a practicing attorney in New York City and Chairperson of the Filipino Lawyers Committee for Human Rights.

I represent the Alliance for Philippine Concerns, a U.S.-based coalition of various organizations and individuals in support of human rights in the Philippines and in opposition to the Marcos dictatorship. Our Alliance includes: Church Coalition for Human Rights in the Philippines (CCHRP), Movement for Free Philippines (MFP), Friends of the Filipino People (FFP), Filipino Lawyers' Committee for Human Rights, Philippine American Group-Advocates for Social Action (PAG-ASA), Philippine Education Support Committee (PESCOM), the Alliance for Philippine National Democracy (UGNAYAN), the Association of Progressive Filipinos (APF), the Campaign to Remove the U.S. Bases in the Philippines (CRUSBP), the International Movement for a Democratic Philippines (IMDP), the Philippine Research Center (PRC), the Samahanang Makabayang Pilipino (SAMAPI) and the Sambayanan.

On behalf of the Alliance for Philippine Concerns and all its member organizations I wish to thank you for this opportunity to testify.

I am here before you today because the proposed Bill—H.R. 5227 would significantly affect millions of people who reside in this country. In particular, I wish to cite its effects on the close to a million member Filipino community of citizens and non-citizens.

We think that it would be valuable to focus on the Philippines as a case study to show how the proposed Act—unless drafted with strong protection against political abuse—would allow a repressive foreign government to abridge the constitutional rights of persons living in the United States.

The Philippine situation makes an excellent case study because, at present, the Marcos government has already filed a criminal conspiracy case against—and has announced its intention to seek the return of 41 anti-Marcos political oppositionists residing in the U.S.

This case is part of an attempt to silence and intimidate the members of the political opposition living in the United States. While his critics originally dismissed the Marcos charge as no more than political slander and a means of keeping them out of the Philippines, recent developments are now giving them a cause of serious concern. Last November 27, the U.S. government initialed an Extradition Treaty with the repressive regime of Mr. Marcos and this Treaty is now up for ratification in the U.S. Senate. This Treaty, as presently constituted, if reinforced by an Extradition Act that is without judicial protection against political abuse, will surely provide the dangerous instrument by which political critics of Mr. Marcos living in the U.S. will be delivered to his repressive government in violation of their rights under both the U.S. Constitution and international law.

(It is also important to emphasize, in this connection, that Mr. Marcos has arbitrarily passed Martial Law decrees which practically convert all political offenses into "criminal acts." This has resulted in his continued and vehement denial, when confronted with documented charges of human rights violations of political prisoners (See Amnesty International's Report on the Philippines, 1975), that there are no

political prisoners in the Philippines but only common criminals charged with violations of specific penal laws.)

The criminal charges against Marcos' U.S. critics have already been filed in the Court of First Instance Quezon City, Philippines. The Marcos government's announcement of its intention to seek extradition was widely reported in the Philippine newspapers (Bulletin Today, January 5, 1982).

This criminal conspiracy case targets almost all the top leaders of the different anti-Marcos groups organized and existing in the United States, charging them with one vast "conspiracy" to overthrow the Philippine government by "assisting" and "supporting terrorist activities" in the Philippines. This conspiracy charge is patently false and political. Many organizations involved are church-related and non-violent as a matter of moral and organizational principle. In addition, there can be no so-called conspiracy among these groups because of widely-known differences among them. For illustration, those charged include persons such as former Senator Benito Aquino, now teaching at Harvard University, and former Senator Foreign Minister Raul Manglapus, well known Marcos critic and occasional columnist for the Washington Post.

At present then, the Marcos government has already announced its intent to politically abuse the extradition process and has taken the initial steps to carry out this abuse.

It would seem that a concern of this committee is to draft extradition legislation which, to the greatest extent possible, protects against the type of political abuse impending from the Marcos government—and which may be engaged in by other foreign governments in the future.

What are the major weaknesses of H.R. 5227 which would allow the Marcos government to abuse the extradition process for is own political purposes? We feel they are as follows:

1. Extraterritoriality—The present statute governing extradition to foreign countries in general requires that the alleged offenses have been committed in the geographic territory of the demanding state. The specific language of the current law, 18 U.S.C. § 3184, allows extradition of persons charged with " . . . having committed within the jurisdiction of any such government any of the crimes provided for by such treaty . . .".

H.R. 5227 (§ 3191) leaves out this provision entirely. While H.R. 5227 does not expressly authorize extraterritoriality, its elimination of the above provision from present law will be interpreted as contemplating and authorizing extraterritorial jurisdiction of a demanding state.

Extraterritorial jurisdiction always infringes on the sovereignty of another country. And, in the area of extradition, involving as it does foreign criminal law, the infringement on sovereignty can be pervasive. Basically, extraterritoriality under H.R. 5227 will cause speech and conduct occurring entirely within the United States to be regulated by the criminal laws of foreign countries.

Why the United States would wish to allow the criminal law of foreign countries to regulate speech and conduct occurring entirely within the United States is difficult to understand.

That some foreign countries will seek to extradite persons for speech and conduct occurring solely in the U.S. is clear. For example, a substantial number of the 41 persons already charged in the Philippines and whose extradition Marcos has announced he will seek, are charged with alleged speech and conduct that occurred entirely in the U.S.

Extraterritoriality introduces a major conceptual change in present extradition law. It provides the basis for extreme political abuse—as is illustrated by the actions and stated intentions of the Philippine government. We strongly urge that H.R. 5227 expressly restrict extradition to persons alleged to have committed offenses within the territorial jurisdiction of a demanding state.

2. Conspiracy—H.R. 5227 at § 3194(e)(2)(viii) includes as an extraditable offense the crime of conspiracy. The inclusion of conspiracy, when coupled with the allowance of extraterritorial jurisdiction, is the aspect of H.R. 5227 ready made for political abuse by foreign governments such as the Marcos regime in the Philippines. Thus, extraterritoriality is the concept and conspiracy is the mechanism for it allows the demanding country to reach into the United States and secure the return of its critics abroad even though those critics may never have been actually or constructively present in the territory of the demanding state during, or for years before and after, the time period when the conspiracy is alleged to have existed. This is in fact the situation with most of the 41 charged in the Philippines against whom Marcos intends to demand extradition. They were in the United States during the entire period during which a conspiracy is alleged to have existed.

Extraterritoriality coupled with a conspiracy charge thus makes it possible for speech and conduct occurring entirely in the United States to be subject to trial, conviction and punishment in foreign courts. The chilling effect of this on the exercise within the U.S. of First Amendment rights cannot be overemphasized.

As an example, former Philippine Senator Raul Manglapus was out of the Philippines when Marcos declared martial law in September 1972. Senator Manglapus settled in voluntary exile in the United States. He has not returned to the Philippines. He has been an outspoken critic of the Marcos government from abroad, frequently criticized Marcos in columns in the Washington Post and New York Times and has been a leading force in building public sentiment against the Marcos government both within and without the Philippine community (over 800,000) in the United States. Now the Marcos government has filed criminal charges against Senator Manglapus in the Philippines and has announced its intention of seeking his extradition.

By alleging that Senator Manglapus' speech and conduct within the United States constituted participation in a conspiracy in violation of Philippine criminal laws and by invoking extraterritorial jurisdiction the Marcos government will demand U.S. assistance in bringing Senator Manglapus within its grasp. On the surface such a development would seem incredible. Unfortunately, H.R. 5227 allows and authorizes such a development and as stated earlier Marcos has already filed the criminal charges and announced his intention of demanding extradition of Senator Manglapus—as well as some 40 others.

We strongly urge that the ability of Marcos and others to reach across the sea through wide net conspiracy charges and force the return of its critics be eliminated from H.R. 5227. This can be done through restricting extraditable conspiracy offenses to those in which the alleged conspiracy exists and is allegedly participated in within the territory of the demanding state, or, as stated above by simply prohibiting all aspects of extraterritoriality from H.R. 5227, or by doing both.

3. Absence of political offense prohibition and failure to place determination with the Courts—H.R. 5227 does state that any issue regarding a political offense is to be determined by the Courts. However, the placement of this provision § 3194(e)(1)(B)(2) in H.R. 5227 makes it clear that such an issue exists only if the treaty in question raises such an issue. In other words, if the treaty does not have an exception to extradition for political offenses then the Courts have no issue to determine. Secondly, if the treaty in question excepts political offenses from extradition but specifically states that determinations regarding political offenses are to be made by the Executive it is doubtful, given the language of H.R. 5227, if the courts would consider this to be an issue raised (for the Court) by the treaty. Nowhere does H.R. 5227 state that persons cannot be extradited for political offenses. It states only that if the treaty raises any issue of political offenses then the court will determine if it is a political offense.

The need for a political offense exception is great to prohibit foreign countries from utilizing U.S. legal process to strike at its political opponents abroad. The need for the courts to determine this issue is to remove it from the pressures, potential embarrassments, objectives, etc., of U.S. foreign policy concerns that occur within the Executive with changes in Administrations. Other reasons why this should be a judicial determination instead of one made by the Executive is that if judicial, it is public and subject to media scrutiny, the person arrested can present witnesses and other evidence and insure that a considered judgment on the merits will be made, and, importantly, appellate review is available. In addition it should be pointed out that a judicial determination of extraditability does not preclude the Executive, in its discretion for whatever humanitarian or foreign policy aims it wishes to accomplish, from refusing to extradite the person.

The doctrine of judicial determination of political offenses in extradition cases has been recognized in this country as early as 1852 when the United States was not yet a global power and did not wield as much influence as it now has over the peoples of other countries. In the case of In Re: Kaine (55 U.S. p. 113) decided by the Supreme Court that year, it was held that "extradition without an unbiased hearing before an independent judiciary is highly dangerous to liberty and ought never to be allowed in this country". Significantly, the court in this case cited with approval the earlier case of Robbins, decided in 1799, which held that an otherwise extraditable crime is "thought to be rendered non-extraditable by the circumstances surrounding its commission and the motives of the offender".

We cited the above precedents to underscore the fact that the doctrine of judicial determination of political offense questions is deeply enshrined in the American legal system and consistently adhered to in a long line of decisions in the interest of individual liberties. This time-honored doctrine has acquired an added validity and

relevance in the present time when we consider U.S. global interest an influence in the third world and the millions of political dissenters and oppressed peoples in such countries some of whom have sought sanctuary and have been accepted in this country for valid humanitarian, legal and moral grounds. Indeed, in light of present day political realities, the doctrine and the historical expansive process in its application instead of being abrogated or reversed as the pertinent portions of the proposed amendments seek to accomplish should be strengthened by legislative and judicial support against executive encroachment.

In a broader sense, the Philippine case illustrates the inherent dangers when attempts are made to transform a judicially-safeguarded, politically-neutral extradition process into a foreign policy instrument, subject to all its attendant political shifts. At stake, of course, would be the constitutionally guaranteed rights of residents in this country.

For all of the above reasons it is extremely important that H.R. 5227 contain an express prohibition on extradition for political offenses and that it be expressly stated that the Courts make the determination.

In conclusion I would like to bring to the Committee's attention a concept of jurisprudence outlined many years ago by Justice Oliver Wendell Holmes. I refer to his concept of the "bad man" theory of law. Law should be formulated, Holmes said, with the "bad man" in mind—because it is the "bad man" who requires the regulation and control of the law and it is from the "bad man" that the rest of society needs protection. Allow me to suggest to the Committee that in the extradition area it is the "bad country" or, more accurately, the "bad government" that should be kept in mind when extradition legislation is promulgated. And, as I hope this case study of the Marcos regime's announced intention to politically abuse the extradition process has illustrated this concern is a very real and immediate one.

Mr. HUGHES. That concludes the testimony for today.

[Whereupon, at 4:40 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL MATERIAL

FEBRUARY 5, 1982.

MR. ROGER M. OLSEN,
Deputy Assistant Attorney General, Criminal Division,
U.S. Department of Justice, Washington, D.C.

DEAR MR. OLSEN: Thank you for appearing before the Subcommittee to testify with respect to H.R. 5227. Your comments will receive the serious consideration from the Subcommittee that they deserve. During your appearance before the Subcommittee on Crime on January 26, 1982, you agreed to answer additional written questions submitted by the Subcommittee. Attached to this letter is a list of those questions. The work of the Subcommittee will be materially assisted if you answer the questions promptly. We anticipate marking up H.R. 5227 in the near future (i.e. early March) and would like to have the benefit of your views on these topics before that markup.

Sincerely,

WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime.

QUESTIONS

1. Under current Federal law the courts are bound under the "rule of non-inquiry" to avoid looking towards the fairness of the trial or treatment to be afforded to the person being sought for extradition. This rule means that the courts have no role to play in determining whether the legal procedures to be used against the person being sought conform to our sense of procedural justice.

Should a bill to reform the extradition laws allow for the courts to inquire into fairness of the courts to which the potential extraditee is being returned? If not, why not? Is there any precedent in international law for an approach that involves the courts in evaluating the due process protection that will be given in the requesting State?

2. Under current Federal law American courts have jurisdiction to determine whether a person is being sought in an extradition case for a "political offense." The few reported cases on this issue indicated that the courts should not, however, consider the issue of whether the request is motivated by political considerations.

Should the courts have the authority to consider the issue of the political motivation behind the extradition request?

Should the courts be in a position to reject extradition requests that are so tainted by political motives that a fair trial would be virtually impossible?

3. In a similar vein should the courts have the authority to refuse to permit the extradition of a person because the extradition request is based upon a desire by the requesting State to punish the person for racial or religious reasons?

For example, during the 1930's should the American courts have been in a position to reject Germany's requests for the extradition of Jews based on an improper motive?

4. A large number of extradition treaties to which the United States is a party contain provisions allowing the United States to decline to extradite a person who establishes a defense based on double jeopardy or immunity from prosecution. Should these procedural protections be extended by statute to all extradition proceedings?

5. Many recent American extradition Conventions, such as the proposed Organization of American States Extradition Treaty, include provisions that limit extradition obligations to crimes of a serious nature. The usual method for approaching this issue is to provide that a person may not be extradited for trial purposes unless the crime is punishable in both the requesting and requested State by more than one

year imprisonment. Similarly, if the person is being sought for completion of a sentence, the person being sought must have more than six months remaining on his sentence.

Should provisions similar to the ones outlined in the American position on the OAS Convention be included in the Extradition Reform Act to assure that the extradition process is reserved for serious cases?

6. There are two areas of potential reform that are not addressed in H.R. 5227 that we are considering adding to the bill. The first is a recognition that in some cases persons who are being extradited from one country to another may travel through the United States. In those cases perhaps we should set forth our obligations and responsibilities.

The second area for a possible amendment would be granting the Government some rights, under constitutional safeguards, to search for evidence of the crime alleged in the extradition proceeding. In addition, we may wish to facilitate the forfeiture of the fruits of the crime by allowing for the issuance of appropriate court orders.

Please provide the Subcommittee with your views on these issues, including any suggested statutory provisions.

7. In some cases of transnational crime it is possible that more than one country may make a request for the extradition of the same person. The question has two parts: First, what factors does the Executive Branch currently take into account when deciding which request will receive priority attention? The second part of the question is whether it is advisable to codify the factors to be used by the Secretary of State in making this determination?

For example, in the context of drafting the Extradition Convention for the Organization of American States, the United States took the position that the following factors should be used to determine how to respond to multiple requests for extradition:

Proposed Alternate Provision on Requests Made by Several States—Article 16: When the extradition of an individual is requested by more than one State, either for the same offense or for different offenses, the requested State may decide which Requesting State will be given preference after consideration of all relevant factors, including but not limited to:

a. The nationality of the offender;

b. The State in which the offense was committed;

c. In cases involving different offenses, the State seeking the individual for the offense which is punishable by the most severe penalty, in accordance with the laws of the Requested State;

d. In cases involving different offenses that the Requested State considers of equal gravity, the order in which requests were received from Requesting States.

Should these factors be included in the statute? If not, why not?

8. Under the provisions of the bill a person, including an American citizen, being sought for extradition can be provisionally arrested for a period of up to sixty days. It is my understanding that the primary reason for this type of provision is to permit the Requesting State the opportunity to gather and send the documents necessary to establish a legal basis for the extradition of the person. The practical effect of this provision is to permit a person to be held for up to sixty days on what may be less than probable cause.

How do you reconcile the provisional arrest authority with your position that bail should be denied except in "special circumstances" as proven by the defendant? Isn't the practical effect of your suggestions to permit the detention of a person based on the representations of a foreign government, amounting to less than the probable cause that would be required in a domestic criminal case?

9. The Senate version of the Extradition Reform Act provides that the courts are deprived of jurisdiction to hear any issues relating to the political offense exception. In addition, that bill bars a person being sought for extradition from seeking any relief as to that issue through a habeas corpus proceeding.

What is the constitutional basis for the suspension of the right to seek habeas relief?

10. What are the international law obligations of the United States with respect to the issue of whether we should return a person for criminal proceeding if the foreign country is motivated by racial, political or religious reasons? What factors does the Secretary of State use to determine whether to refuse to return a person because of the improper motives of the requesting country? Who makes these decisions? Are such decisions reviewed by the Secretary of State personally? How often do these type of circumstances arise?

11. In the *Abu Eain* and *Mackin* cases the government seems to have taken the position that the authority of the Executive Branch to conduct foreign affairs requires, as a matter of constitutional law, that the courts be deprived of jurisdiction to hear issues relating to the political offense question. In light of the court's decisions in those two cases rejecting that argument, do you still maintain that the political offense exception must be decided by the Executive Branch as a matter of constitutional law?

12. Assuming the courts continue to have jurisdiction over the political offense question, should the courts be precluded from hearing evidence on that issue until the courts finds that person is otherwise extraditable?

13. Should H.R. 5227 include the Rule of Speciality? If not, why not?

14. What rules, civil or criminal, should govern discovery in extradition cases?

15. Should extradition proceeding be stayed with respect to a person who has sought political asylum, until there has been final action on the asylum application? If not, why not?

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., April 1, 1982.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Following his appearance before your Subcommittee to testify with respect to H.R. 5227, you wrote Deputy Assistant Attorney General Roger M. Olsen, Criminal Division, asking him to respond to fifteen additional questions. The same questions were addressed to the Department of State. The Departments of State and Justice have divided the responsibility of preparing responses to the questions. Enclosed with this letter are answers, prepared by the Department of Justice and approved by the Department of State to questions 4, 5, 6, 7, 8, 9, 11, 13, and 14. The Department of Justice has approved the answers to the remaining questions prepared and submitted by the Department of State.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General,
Office of Legislative Affairs.

ANSWERS

4. We do not believe that statutory provisions mandating denial of extradition on grounds of double jeopardy or immunity from prosecution are necessary or wise.

The Courts in the United States have long agreed that the Fifth Amendment guarantee against double jeopardy does not apply in extradition proceedings[1] unless the extradition treaty contains a provision on the matter. Similarly, it is settled law that the arguable running of the statute of limitations is not a defense to extradition unless the applicable treaty expressly provides that it is.[2] Thus, there is no constitutional or legal obligation to construct an obstacle to extradition of this kind absent applicable treaty language.

In our view, claims that the prosecution abroad will fail because of double jeopardy considerations, pardon or other immunity from prosecution, or the running of the statute of limitations in the requesting country are all in the nature of affirmative defenses best raised and resolved in the courts of the requesting country. Moreover, we can envision situations where a terrorist flees to a "friendly" country after commiting a terrorist act. The "friendly" country, in order to protect the terrorist from prosecution or extradition, might immunize him or prosecute him and impose a minimal, and plainly insufficient, penalty. A statutory double jeopardy provison in the United States extradition laws could thereby cause us to aid and abet such terrorist activity.[3]

While it is true that many of our extradition treaties contain some kind of a double jeopardy provision, it is also true that the negotiators of the remaining treaties knew of—and chose not to agree to—such language. A statutory provision of the

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[1] *United States ex rel. Bloomfield* v. *Gengler*, 507 F.2d, 925, 927 (2d Cir. 1974); *Neely* v. *Henkel*, 180 U.S. 109 (1901)

[2] *Freedman* v. *United States*, 437 F.Supp 1252, 1260–1265 (N.D. Ga. 1977); *Merino* v. *U.S. Marshal*, 326 F.2d 5 (9th Cir. 1963), cert. den. 377 U.S. 997 (1964); *Hatfield* v. *Guay*, 87 F.2d 358, 364 (1st Cir. 1937).

[3] *Cf. Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936)

kind in question would unilaterally alter the treaties now silent on the issue or which have a double jeopardy provision different in scope from that which may be adopted by the proposed provision. By commanding that extradition be denied in instances other than those agreed by treaty, the suggested provision could put the United States in breach of its international obligations.

5. We do not believe that a statutory provision restricting extradition to "serious cases" is necessary.

It is true that many of our more recent treaties permit extradition of an accused only if at least one of the crimes involved is punishable in both countries by more than one years' imprisonment, and limit the extradition of convicted persons to cases in which at least six months' imprisonment remains to be served.[4] However, the overwhelming majority of the treaties contain no such requirement. Thus, a statutory provision of this kind would unilaterally alter the terms of most treaties. In our view, the friendly foreign nation which has diligently satisfied all of the provisions of a treaty negotiated in good faith with us is entitled to the ungrudging surrender of the fugitive, and should not be confronted with restrictions unilaterally imposed after the treaty was signed.

Moreover, a treaty provision restricting extradition to a certain class of more serious crimes is best arrived at after considering a variety of factors such as the difficulty and expense of extradition with the country involved. Thus, a minimum punishment requirement may make perfectly good sense in a treaty with a distant, non-English speaking country and make less sense in a treaty between the United States and Canada or Jamaica. For these reasons, it is undesirable to try to legislate such a provision for the whole world rather than negotiate it on a country by country basis.

6. Most of our extradition treaties require that the United States honor a request by our treaty partner for permission to transport through this country a person surrendered to our treaty partner by a third state. Although we currently honor such requests without specific legislation,[5] it may well be useful to set out in the proposed legislation our obligations and responsibilities in this area. We propose the following language:

"§ 3197. Cooperation with Transit through United States—The Attorney General, in consultation with the Secretary of State may assist with the transit through the United States of a person being sent from one foreign state to another to face criminal changes, to be sentenced, or to serve a sentence in the latter state. The Attorney General is authorized to hold such person in custody until satisfactory arrangements can be made for the continuation of such person's travel."

Almost every extradition treaty also contemplates that the requested state will seize evidence or fruits of crime found on the fugitive and deliver these items to the requesting state.[6] We believe that these treaty clauses themselves provide adequate authority for us to carry out this obligation [7] and that in any event existing federal law offers ample bases for such action.[8] However, should the subcommittee deem it desirable to propose legislation in this area, we suggest the following language:

1. An officer executing a warrant issued pursuant to Section 3192 may seize any articles which may have been:

(a) used in committing the crime or which may be required as evidence;

(b) acquired as a result of the offense and are found in the possession of the person sought at the time of arrest or which are discovered subsequently; or

(c) acquired from the property or valuables connected with the offense.

Any property seized pursuant to this section shall be deposited with the court, which issued the warrant, pending further proceedings.

2. The Secretary of State may order that property seized pursuant to this Section be delivered to the custody of an agent of the foreign state requesting extradition. The Secretary may make such order before, after, or at the same time it is decided whether to extradite the person sought, and the delivery of property may take place even if the person sought is not surrendered.

3. Nothing in this Section shall predjudice any rights which any person may have in any property which is seized under this Section.

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[4] See, e.g., Article 2, U.S. Turkey Extradition Treaty signed at Ankara June 7, 1979, entered January 1, 1981,—UST—, TIAS 9891.

[5] 6 Whiteman, "Digest of International Law" 1078-1082 (1968).

[6] Bedi, "Extradition in International Law and Practice," 160-162 (1968); See, e.g., Article 15, U.S. Turkey Extradition Treaty, signed at Ankara June 7, 1979, entered into force January 1, 1981,—UST—, TIAS 9891.

[7] See, e.g., *In Re Search Warrant for Warehouse Known as 2415 Campbell Street, Oakland California*, No. Cr. 3-80-1742-MG (N.D.Cal. order entered March 3, 1981).

[8] 28 U.S.C. 1782.

7. When the United States receives extradition requests for the same person from two or more countries, the Secretary of State decides which nation's request will be given priority. The starting point for the Secretary's analysis is always the terms of the applicable extradition treaties. Many of our treaties provide that the preference be given to the request received first,[9] others accord priority to the country whose request involves the more serious offense,[10] still others contain lists of factors to be considered in deciding the issue,[11] and some simply acknowledge the discretion of the requested state to decide the issue. If the treaties do not contain an answer (or are themselves in conflict), the Secretary considers a wide variety of factors ranging from the comparative likelihood of each request's success on the merits to the probable disposition of the fugitive after surrender. The Secretary may also weigh the state of our general diplomatic relations with each of countries involved.

We do not believe that the list of factors contained in the OAS Convention should be inserted in the statute. There are several reasons for this view.

First, there are factors which the Secretary should consider which are not set out in the OAS language. For example, several treaties specify that one factor to be weighed is "The possibility of subsequent extradition to another state," [12] a factor which figured heavily in one recent case but which is not mentioned in the OAS Convention's list. A synthesis of all of the factors cited in all of the treaties which list factors for consideration would be lengthy and cumbersome.

Second, the OAS Convention's approach is only one of several formulas on this issue contained in various treaties now in force. Thus, the OAS language could cause problems if placed in a statute and imposed in all extradition cases. For example, suppose that the United States received two extradition request's for the same person, each request arising under one of the numerous treaties specifying that "first in time" should receive priority. Clearly the Secretary's decision would be fairly easy in this case—unless he is commanded by statute to base his decision on factors other than chronological order. In fact, a statute incorporating the OAS Convention language could conceivably place the United States in breach of its treaty obligations to countries with which a different rule has been agreed to.

In any event, a statutory provision on this topic would have to be very flexible, and therefore, largely exhortatory. Since at present the Secretary has no difficulty identifying and making the sometimes sensitive determinations called for in these cases, we do not see how exhortatory legislation would be of much value.

8. Provisional arrest is a well recognized aspect of international extradition procedure specifically provided for in most of our extradition treaties. There is no tension between provisional arrest and the rule, developed by the courts and codified in the Senate version of the Extradition Reform Act, that bail is generally inappropriate in extradition cases unless special circumstances are shown.

Provisional arrest is only employed when there is sound reason to believe that the person sought will continue his flight and go into hiding or be outside of the requested jurisdiction before the documents needed for extradition are assembled. Viewed in this light, it is hardly surprising that a fugitive who has been provisionally arrested is not accorded the same open access to bail which obtains in other kinds of cases. Indeed, most foreign countries find it strange indeed to see our Courts agree that a particular fugitive found within our borders is such an imminent flight risk that provisional arrest is in order—then generously release the fugitive on bail so that he can flee.

We do not believe that the present state of the law or the Senate version of the proposed legislation permits detention of persons on less than probable cause. While the constitutional question is technically still open,[13] we believe that the constitutionally mandated requirement of probable cause applies in arrests for extradition. However, we do not agree with the assumption, implicit in your question, that probable cause for provisional arrest should be identical to probable cause in a domestic criminal case. In our view, there is ample probable cause to arrest for extradition if

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[9] E.g., U.S.-U.K. Extradition Treaty, signed at London December 22, 1931, entered into force June 24, 1935 (now applicable to nearly thirty former British colonies), 47 Stat. 2122, TS 849, 12 Bevans 482.

[10] E.g., U.S.-Switzerland Extradition Treaty, signed at Washington May 14, 1900, entered into force March 29, 1901, 31 Stat. 1928, TS 354, 11 Bevans 904.

[11] E.g., U.S.-Argentine Extradition Treaty, signed at Washington January 21, 1972, entered into force September 15, 1972, 23 UST 3501, TIAS 7510.

[12] E.g., Article 16, U.S.-Norway Extradition Treaty, signed at Olso June 9, 1977, entered into force March 7, 1980 — UST —, TIAS 967).

[13] *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

there is reliable information that a specified person is the subject of an arrest warrant in a foreign jurisdiction for an extraditable offense.[14]

9. The Senate bill does not "suspend" any person's "right" to seek habeas corpus relief on the political offense exception, because there is no such right.

The Courts have held that a suspected fugitive has no right to a extradition hearing unless Congress provides for one.[15]

Once the fugitive has been found extraditable and taken into custody, habeas corpus is available, but only to test the legality of the detention, not as de novo review. If the extradition magistrate does not consider the political offense exception, there is no occasion for habeas corpus review to arise.

There does not appear to be any constitutional infirmity with the section which restricts habeas corpus and other judicial relief to situations in which the fugitive has exhausted his direct appellate remedies. This provision calls to mind similar action undertaken by Congress in the immigration field. Prior to 1954, aliens fighting deportation could challenge each unfavorable administrative ruling by seeking a declaratory judgment, or mandamus, or by filing *seriatum* habeas corpus actions. Then Congress passed 8 U.S.C. 1105a, which established direct review of deportation orders in the Court of Appeals. The statute also effectively barred habeas corpus in deportation cases to instances in which the alien had exhausted his administrative and appellate remedies. The Courts unheld the constitutionality of this action. In fact, one court noted:

"The limitation of the writ to cases where the statutory exceptions do not apply and the administrative decision has not been judicially reviewed previously serves to conserve institutional resources by preventing repetitious litigation and securing the finality so necessary in a workable judicial system."[16]

11. The government has not argued that as a matter of constitutional law the decision on whether an offense is a political offense or an offense of a political character is required to be made solely by the Executive Branch. Rather, it has argued that this decision is primarily a foreign affairs related decision which the Secretary of State, with the superior sources of information available to him, is in the best position to make. Thus confiding this decision to the Secretary of State is in accordance with the policy expressed in the Constitution of placing the conduct of foreign affairs in the Executive Branch, but is not mandated by the Constitution.

13. We do not believe that a statutory provision on the Rule of Specialty is necessary. A provision guaranteeing application of the rule is contained in almost every United States extradition treaty, and the Supreme Court has ruled that federal courts here are obliged as a matter of international law to honor the rule even if it is not in the Treaty.[17] Thus, it is a principle so entrenched in jurisprudence that specific legislation is unnecessary.

Nevertheless, if the subcommittee deems it appropriate to codify the law on this point, we suggest the following:

1. The Secretary of State may decline to order the surrender of any person found extraditable under Section 3194 if, in the Secretary's opinion, the foreign state requesting extradition intends to prosecute or punish the person sought for any offense other than that for which extradition was approved.

2. Any person who was extradited to the United States from a foreign state shall not be prosecuted or punished for any offense other than that for which extradition was granted unless:

(a) The offense occurred after extradition;

(b) The foreign state which granted extradition consents to the prosecution or punishment;

(c) The person extradited consents to the prosecution or punishment;

(d) The person extradited has remained in the Unites States more than forty-five days after being free to leave; or

(e) The person extradited has left the territory of the United States after his extradition, and voluntarily returned to it.

14. Neither. Extradition proceedings are *sui generis*, not quite either civil or criminal in nature. The settled rule developed by the courts is that discovery is very lim-

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[14] 6 Whiteman, "Digest of International Law" 931 (1968); *Whitely* v. *Warden, Wyoming State Pententiary*, 401 U.S. 560, 568 (1970); *United States* v. *Miles*, 413 F.2d 34, 41 (3rd Cir. 1969); *Stallings* v. *Spain*, 253 U.S. 339 (1919).

[15] *Geen* v. *Fetters*, 1 F.Supp. 637 (E.D. Pa. 1932); cf. *Sayne* v. *Shipley*, 418 F.2d 679 (5th Cir. 1969), cert. den. 390 U.S. 903 (1970).

[16] *United States ex rel. Tanfara* v. *Esperdy*, 347 F.2d 149, 152 (2d Cir. 1965). See also *Mir* v. *Rosenberg*, 390 F.2d 627 (9th Cir. 1967) *Application of Argyros*, 245 F.Supp. 190 (S.D.N.Y. 1965); Gordon and Rosenfield, "Immigration Law and Procedure," 8.9A (1977).

[17] *United States* v. *Rauscher*, 119 U.S. 407 (1886).

ited, and confided to the discretion of the extradition magistrate.[18] It is helpful to keep in mind that an extradition hearing is most closely analogous to a preliminary hearing under the Federal Rules of Criminal Procedure, and no discovery is ordinarily permitted at those proceedings.

DEPARTMENT OF STATE,
Washington, D.C., March 15, 1982.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Following his appearance before your Subcommittee to testify with respect to H.R. 5227, you wrote Deputy Legal Adviser Daniel W. McGovern, asking him to respond to fifteen additional questions. The same questions were addressed to the Department of Justice. The Departments of State and Justice have divided the responsibility of preparing responses to the questions. Enclosed with this letter are answers, prepared by the Department of Justice, to questions 1, 2, 3, 10, 12 and 15. The Department of State has approved the answers to the remaining questions prepared and submitted by the Department of Justice.

With cordial regards,

Sincerely,

POWELL A. MOORE,
Assistant Secretary for Congressional Relations.

Question 1. Under current Federal law the courts are bound under the "rule of non-inquiry" to avoid looking towards the fairness of the trial or treatment to be afforded to the person being sought for extradition. This rule means that the courts have no role to play in determining whether the legal procedures to be used against the person being sought conform to our sense of procedural justice.

Should a bill to reform the extradition laws allow for the courts to inquire into fairness of the courts to which the potential extraditee is being returned? If not, why not? Is there any precedent in international law for an approach that involves the courts in evaluating the due process protection that will be given in the requesting State?

Answer 1. It should be noted that the "rule of non-inquiry" is a judicially created doctrine. The considerations which led the courts to develop this principle of self-restraint remain compelling and support retention of the rule. These considerations were expressed in the landmark decision of *Neeley* v. *Henkel*, 180 U.S. 109 (1901). Responding to the observation that the person whose extradition was requesting was a citizen of the United States, the court stated:

"[S]uch citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States" (180 U.S. at pp. 122-23.)

The rule of non-inquiry was perhaps most fully discussed in *Gallina* v. *Fraser*, 278 F. 2d 77 (2nd Cir. 1960):

"[W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. There is nothing in [case citations omitted] indicating that the foreign proceedings must conform to American concepts of due process . . . The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government" (278 F. 2d at pp. 78-79.)

It is important to note that the *Gallina* court, "confess[ing] to some disquiet" about the implications of the rule of non-inquiry, effectively qualified that rule by stating "We can imagine situations where the relator, upon extradition would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle" (id.). Repeating and endorsing

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[18] *Sabatier* v. *Dambrowski*, 453 F. Supp. 1250, 1255 (D. R.I. 1978), *aff'd* 586 F.2d 866 (1st Cir. 1978); *Jhirad* v. *Ferrandina*, 377 F. Supp. 34, 37 (S.D.N.Y. 1974).

this qualification, the court in *U.S.* v. *Gengler,* 507 F. 2d 925, 928 (2nd Cir. 1974) stated that the inability to assert a defense might be one such situation.

The rule of non-inquiry is a commendable example of judicial self-restraint. In the absence of allegations that would satisfy the sort of "shocking to the conscience" standard enunciated in *Gallina,* the courts should continue to refrain from evaluating the criminal justice systems of our extradition treaty partners, whose constitutions, history and traditions may differ significantly from American standards. Rather, the Secretary of State should be permitted to exercise his historic role to take into account all relevant factors, including foreign procedural justice, in determining whether to either conclude an extradition treaty with a given country or grant extradition in a given case. See *In re Lincoln,* 228 Fed. 70, 74, aff'd per curiam, 241 U.S. 651 (1916), discussed below in the response to question 2.

The practice of other countries generally conforms to that of the United States in this regard. There is one recent British extradition case, however, involving judicial scrutiny of foreign judicial procedure, *R.* v. *Governor of Winson Green Prison, Birmingham, ex parte Littlejohn,* [1975] 1 W.L.R. 893; [1975] 3 All E.R. 208, D.C. There the British Divisional Court, on an application for habeas corpus, was asked by a convicted IRA armed bank robber to preclude his extradition on the ground that his trial in the Republic of Ireland had been before a special court, rather than a court of normal criminal procedure. The Divisional Court noted three distinctive aspects of the special court's procedures: the absence of a jury, more liberal rules of admissibility of evidence in the case of certain offenses, and the fact that, under the pertinent statute, special courts were only to be established where "the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order in relation to offenses of any particular kind." Notwithstanding these distinctive features of the special court in which the defendant was convicted, the Court unanimously refused to grant habeas corpus and upheld the magistrate's order of extradition to the Irish Republic.

Question 2. Under the current Federal law American courts have jurisdiction to determine whether a person is being sought in an extradition case for a "political offense." The few reported cases on this issue indicate that the courts should not, however, consider the issue of whether the request is *motivated* by political considerations.

Should the courts have the authority to consider the issue of the political motivation behind the extradition request?

Should the courts be in a position to reject extradition requests that are so tainted by political motives that a fair trial would be virtually impossible?

Answer. 2. No reason appears to overturn the well settled rule that the courts will defer to the Secretary of State the question whether the requesting country's motives in seeking extradition are political. Again, the considerations which led the courts to develop this doctrine of self restraint remains compelling and support retention of the rule. These considerations were well expressed in the seminal case, *In re Lincoln,* 228 Fed. 70, *aff'd per curiam,* 241 U.S. 651 (1916). Declining to address the contention that defendant was being sought for political reasons, the court stated:

"It does not seem that this question can be disposed of or should be disposed of by the court * * * [¶] [I]t is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State. The government of the United States, through the Secretary of State, should determine whether * * * diplomatic and treaty obligations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty. [¶] It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge." (at p. 74; accord: *Ziyad Abu Eain* v. *Wilkes,* 641 F. 2d 504 (7th Cir. 1981), *cert. denied; Garcia-Guillerin* v. *United States,* 450 F. 2d 1192 (5th Cir. 1971); *In re Locatelli,* 468 F. Supp. 568, 575 (S.D.N.Y. 1979); *Sindona* v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978).

As for requests that are "so tainted by political motives that a fair trial would be virtually impossible," the Department of State may be relied upon to screen out such requests. If the political character of such a request were not apparent at the

initial screening stage and the individual were found extraditable by the courts, the Secretary of State would ultimately decline to surrender him.

Question 3. In a similar vein should the courts have the authority to refuse to permit the extradition of a person because the extradition request is based upon a desire by the requesting State to punish the person for racial or religious reasons? For example, during the 1930's should the American courts have been in a position to reject Germany's requests for the extradition of Jews based on an improper motive?

Answer 3. The same considerations which have led the courts to defer to the Secretary of State the consideration of whether the requesting country's motives in seeking extradition are political support such deference with regard to allegations of racial or religious motivation.

Question 10. What are the international law obligations of the United States with respect to the issue of whether we should return a person for criminal proceeding if the foreign country is motivated by racial, political or religious reasons? What factors does the Secretary of State use to determine whether to refuse to return a person because of the improper motives of the requesting country? Who makes these decisions? Are such decisions reviewed by the Secretary of State personally? How often do these type of circumstances arise?

Answer 10. The international legal obligations of the United States with respect to returning a person for criminal proceedings if the foreign country is motivated by racial, political or religious reasons emanate from the applicable extradition treaty and the 1967 Protocol Relating to the Status of Refugees, to which the United States is a party.

It is our now standard treaty practice to provide that extradition shall be denied if it is sought for political purposes. However, it is not our treaty practice to provide for either mandatory or permissive denial of extradition requests that are motivated by racial or religious motives, principally because the United States does not enter into extradition treaties with countries which are likely to make extradition requests based on such improper motives.[1]

Article 33 of the 1951 Convention Relating to the Status of Refugees, the substantive provisions of which are incorporated by reference into the 1967 Protocol, to which the United States is a party, prohibits the expulsion or return (refoulement) of any refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

However, under Article 1(F) the protection prohibiting refoulement does not extend to "any person with respect to whom there are serious reasons for considering that * * * he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee * * *."

The Secretary of State has discretion to determine whether a person found extraditable by the courts shall be surrendered to the requesting country (18 U.S.C. 3186). The Secretary has made a general delegation of his surrender authority to the Deputy Secretary, subject to the condition that the Secretary may at any time exercise that authority.[2] In determining whether to surrender a person who alleges that the extradition request was tainted by political, racial or religious considerations, the Secretary or the Deputy Secretary would be guided by the provisions of the applicable treaty and the 1967 Protocol. The Secretary would take into account evaluations prepared by State Department officers familiar with the requesting country, the written views of the person whose extradition is sought, the views, if any, of the requesting country concerning the question of improper motivation, the views of Members of Congress, and the views of interested members of the public.

Cases involving foreign requests motivated by racial, political or religious reasons do not arise frequently.

Question 12. Assuming the courts continue to have jurisdiction over the political offense question, should the courts be precluded from hearing evidence on that issue until the courts find that person is otherwise extraditable?

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[1] This differs from European treaty practice. See, e.g., Article 3(2) of the European Convention on Extradition of December 13, 1957 which provides that the rule that extradition shall not be granted for political offenses shall also apply if "the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

[2] Department of State Delegation of Authority No. 134 (Extradition of Fugitives), Federal Register, Vol. 41, No. 63, March 31, 1976, at 13628.

Answer 12. Assuming that the courts continue to have jurisdiction over the political offense issue, a court *should* be precluded from hearing evidence on that issue until it finds that the person sought is otherwise extraditable. This approach would conserve scarce judicial resources. The political offense issue is likely to be, by far, the most time-consuming issue in a case. There is no point in reaching the issue if the person is not otherwise extraditable. Moreover, the risk of damage to this country's foreign relations is reduced to the extent that the Department of State need not take a public position on a political offense claim.

Question 15. Should the extradition proceeding be stayed with respect to a person who has sought political asylum, until there has been final action on the asylum application? If not, why not?

Answer 15. The Departments of State and Justice have recently been studying this question. Although there is no regulation currently in force for dealing with contemporaneous extradition and asylum proceedings, in practice the initiation of an extradition proceeding has resulted on occasion in the suspension of the processing of an asylum claim.

This practice would seem to be the most sensible, efficient and fair procedure to all parties. It would permit the government to obtain the fullest body of information for consideration, particularly information relating to whether or not the person may have committed a "serious non-political crime," within the meaning of the Protocol and Convention Relating to the Status of Refugees. An additional reason for this practice is that asylum proceedings have the potential to become protracted, and could be abused by someone seeking to use that process for dilatory reasons.

Thus, it is considered that extradition proceedings should not be stayed with respect to persons who have sought political asylum until there has been final action on an asylum application.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., September 22, 1982.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice regarding H.R. 6046, a bill to revise extradition laws. On August 19, the Senate approved a similar extradition law revision bill, S. 1940.

The Department of Justice strongly supports passage of H.R. 6046. Reform of the nation's grossly antiquated extradition laws is a high priority of this Department in view of the increasing numbers of requests for extradition and the unsatisfactory nature of present federal statutes in fulfilling our responsibilities with respect to international terrorists, narcotics traffickers, and other fugitives.

While you are aware of this Department's reservations regarding the bill's bail provisions and certain less significant concerns with some other provisions of the bill, in our view H.R. 6046 makes numerous important improvements in our extradition laws which will enable the United States to play a more effective role in the fight against international terrorism and narcotics trafficking. Pursuant to discussions with you and your staff we are confident that, with your help, our difficulties with H.R. 6046 can be resolved to all parties' satisfaction at the conference with the Senate on the respective House and Senate bills.

We greatly appreciate your leadership in the effort to strengthen and improve United States extradition laws so that we can honor our extradition treaty commitments. We believe that enactment of this legislation will result in improved compliance with requests of the United States for return of persons sought by law enforcement authorities here.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
New York, N.Y., July 6, 1982.

Hon. PETER RODINO, Jr.,
Chairman, Committee on the Judiciary,
Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN RODINO: At its recently concluded National Commission Meeting, the Anti-Defamation League of B'nai B'rith adopted a resolution relating to the extradition of terrorists.

We hope you will take our action into consideration in the deliberations of the House Foreign Affairs Committee on this matter.

A copy of the text of the resolution is enclosed for your information.

Sincerely,

KENNETH J. BIALKIN,
National Chairman.

RESOLUTION ON THE LEGISLATION AFFECTING THE EXTRADITION OF TERRORISTS

Whereas, there is legislation pending before Congress to divest the federal courts of jurisdiction to determine when an individual can be extradited for a political offense; and

Whereas, the Anti-Defamation League of B'nai B'rith has consistently opposed any attempts to divest the federal courts of jurisdiction: Now, therefore, be it

Resolved That the Anti-Defamation League of B'nai B'rith opposes legislation, including Senate Bills 1639 and 1940, which would remove from the federal courts jurisdiction to determine whether a foreign state is seeking extradition of an individual for an offense of a political character.

(Adopted: National Commission Meeting, The Grand Hyatt, New York City, June 6, 1982.)

THE GEORGE WASHINGTON UNIVERSITY,
Washington, D.C., March 1, 1982.

Chairman WILLIAM J. HUGHES,
Subcommittee on Crime Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN HUGHES: I write in response to your request that I comment upon H.R. 5227 to reform the extradition laws which was introduced by you on December 15, 1981, as well as S. 1639 which was introduced by Senator Strom Thurmond on September 18, 1981.

I have studied both bills as well as the prepared statement of Professor Christopher H. Pyle which was presented to your Subcommittee on November 17, 1981. More recently I have studied Professor Pyle's analysis of the draft Extradition Act of 1982 dated January 15, 1982. I am familiar with the authorities cited by Professor Pyle and I associate myself with the analyses and conclusions submitted to you by him. His analysis is thorough and accurate and it would not be a proper use of the Subcommittee's time for me to analyze the same authorities and come to the same basic conclusions. I want to stress that the principles of constitutional rights including due process of law and of international human rights recognized by the U.S. Government seem to me to require the recommendations which he has made. In my opinion, his recommendations are entirely consistent with the fundamental constitutional premise that in extradition law, where human rights are involved in a most basic manner, the rule of law must take precedence over political expendiency. In my judgment there is no place in a civilized legal system for the political policy, enunciated more clearly in S. 1639 than in H.R. 5227, that extradition is beyond the scope of constitutional protections.

Turning specifically to H.R. 5227, I want to emphasize my conviction that two assumptions contained in it are erroneous and particularly dangerous. The first is the implicit assumption that a hearing on the probable cause issue is a judicial proceeding free from political influence and prejudice. The second is the explicit assumption in Section 3194(e)(1)(A) that the Secretary of State is qualified to determine whether or not the foreign state is seeking extradition because of the person's "political opinions, race, religion or nationality." The fallacies of these assumptions are made clear *In the Matter of the Extradition of Ziyad Abu Eain*, #79 M 175, in the U.S. District Court for the Northern District of Illinois. The ensuing comments are based upon my experience as an expert witness in the case as well as on an examination of the extradition hearing records and the opinion of the U.S. Court of Appeals.

On Wednesday afternoon, October 3, 1979 Mr. Thomas P. Sullivan, the U.S. Attorney for the Northern District of Illinois, accompanied by Mr. Louis Fields, Assistant Legal Adviser of the Department of State for matters concerning terrorism, visited

me in my office at the George Washington University Law Center. I was not aware at the time that Messrs, Sullivan and Fields had just come from a high level meeting in the State Department presided over by Mr. Warren Christopher, then the Deputy Secretary of State, coordinating State and Justice efforts to achieve the political objective of having Mr. Abu Eain extradited to the State of Israel. Mr. Sullivan gave me the impression that the matter in which I was to appear was essentially a situation dealing with a terrorist who must be extradited in order to protect the United States from becoming a haven for terrorists. This was such a crucial objective that all possible means would be used to achieve it.

I appeared as a witness on the afternoon of Tuesday, October 9, 1979. I had been told by Mr. Abdeen Jabara, one of the counsel for Mr. Abu Eain, that the issue in the extradition hearing was limited to a determination of probable cause and that the questions on both direct and cross-examination would be so limited. The hearing was presided over by the Honorable Olga Jurco, Magistrate.

I understand that in most extradition hearings the U.S. Government is represented by an Assistant U.S. Attorney. I also understand that it is not usual for the Government to arrange for Mr. Fields to come from Washington to enunciate the view of the State Department that an act of terrorism is involved. Officials of the Government of Israel appeared at the trial to assist Mr. Sullivan. In my opinion, Mr. Sullivan's purpose in appearing personally was to convert the hearing on the issue of probable cause into a criminal trial of "a terrorist" but without either the procedural or substantive due process of law which would be applicable in a criminal trial. The only evidence of the Government of Israel tending to show probable cause was the "confession" of a single alleged accomplice named Yasin who signed the "confession" in a language foreign to him some weeks after being taken into custody and without the benefit of presence of counsel. Such a "confession" would, of course, be inadmissible in a criminal trial on the merits in this country. Further, the "confession" was recanted twice and the Magistrate violated Fifth Amendment due process of law in not allowing the recantations to be admitted. The recantations would not have merely contradicted the evidence of probable cause but would have totally destroyed it and the case of both governments against Mr. Abu Eain. The Magistrate, in addition, refused to take judicial notice of the well-known fact "that there is now and has existed for more than three decades, a military and political conflict between the Government of the State of Israel and the several Arab states and the People of Palestine," The Government of Isreal has gone beyond this fact itself since it has argued a technical "state of war" in attempting to justify particular armed attacks which it has carried out.

I believe that one of the reasons Mr. Sullivan's purpose of converting the hearing was accomplished successfully was that a U.S. Magistrate does not have the independence or security of tenure that a Federal District Judge has. I think it is very unfortunate that this fundamental miscarriage of justice at the trial level was not corrected at the appeal level. The opinion of the three judge panel of the Court of Appeals for the Seventh Circuit was characterized more by social and political considerations than by the law concerning jurisdiction. The failure of the U.S. Supreme Court to grant *certiorari* in this important case can be best explained by the length and complexity of the docket being beyond the ability of nine justices to handle adequately.

I think it is important to stress that this successful subversion of the extradition process took place under the existing statutory provisions which accord considerably less discretion to the Executive Branch than would be accorded to it if the provisions of S. 1639 were enacted into law. The *Ziyad Abu Eain* extradition hearing indicates clearly that even under the present statutory pattern, when the Executive Branch is determined to subvert the extradition process and make it de facto into a criminal case, it can do so successfully, thereby circumventing all the due process protections of U.S. criminal law.

The *Ziyad Abu Eain* case also demonstrates the lack of qualification, indeed the incompetence, of the Department of State to decide whether or not the foreign state is seeking extradition because of the person's "political opinions, race, religion or nationality." The racist antagonism of the Government of Isreal to Arabs in general and Palestinians in particular is well-known. Even the State Department's "Country Reports on Human Rights Practices" for the past few years indicate Israeli practices in dealing with Palestinians which fall far short of the requirements of law in the United States. The more objective publications of Amnesty International provide convincing evidence, *inter alia*, that convictions of Palestinians are often made on the basis of questionable confessions alone.

The *Ziyad Abu Eain* case is not the first instance in which the State Department has extradited a victim of racist persecution to a racist state. In 1933, apparently

several months after the coming to power of the Nazi regime, the State Department attempted to justify the extradition of a Jew to Germany in the following terms:

"The Secretary of State has sent to the German Ambassador a warrant for the surrender of the fugitive since the evidence introduced by the German Government made out a prima facie case of guilt against him. However, this action was not taken until the receipt from the Ambassador of assurances that Lewin would be given a fair trial in Germany and that the fact that he is a member of the Jewish race would not operate to prejudice the courts against him." 4 Hackworth, "Digest of International Law" 215 at 216 (U.S. Dept. State, 1942)

It must be mentioned that in the language quoted the State Department accepted the Nazi and Zionist conception of Jewish identity as involving racial identification, i.e., "the Jewish race." Apparently the Department was either unaware of or felt no obligation to adhere to the constitutional requirements here. Under the First Amendment, Jews, like the adherents of other religions, are legally entitled to voluntary membership in a religious fellowship without any ancillary racial or national identification being attached to them. Since the State Department is not aware that Jewish identification is religious rather than racial, it cannot be presumed that it will make accurate determinations under the criteria of H.R. 5227 concerning a person's "political opinions, race, religion or nationality."

It should be mentioned that in the *Isaak Lewin* case the Department was willing to accept the assurances of the German Ambassador that a fair trial would take place in Nazi Germany in spite of common knowledge of the attitude of the Nazis toward Jews. Similar assurances have also been given by the Government of Israel in the *Ziyad Abu Eain* case.

An article in the January 1982 issue of the Chicago Lawyer provides information on another aspect of Mr. Sullivan's desire to "get" Mr. Abu Eain. According to this article which appears to be based on a factual investigation, Mr. Sullivan used his influence to accord special favors to a convicted felon in the hope that the latter would provide some kind of testimony against Mr. Abu Eain. The result was that the felon was released from custody and proceeded to commit a further series of crimes of violence. The logical conclusion seems to be that Mr. Sullivan was so eager to provide evidence, of any degree of credibility whatsoever, against Mr. Abu Eain that he was taken in by a mentally deranged felon.

I hope that this letter will be helpful in performing the important work of the Subcommittee. I trust that you will deem it appropriate to print the article from the Chicago Lawyer with this letter in the forthcoming Committee Hearings.

Sincerely yours,

W. T. MALLISON,
Professor of Law and Director,
International and Comparative Law Program.

[From the Chicago Lawyer, January 1982]

PLO PLOT TO KILL TOM SULLIVAN?

(By Roo Warden)

Two weeks before Christmas, 1979, then-U.S. Attorney Thomas P. Sullivan began a federal grand jury investigation into an alleged conspiracy by the Palestine Liberation Organization to conduct an armed raid on the Dirksen Federal Building.

The object of the raid supposedly was to kill Sullivan and free an accused Palestinian terrorist.

The accused terrorist, Ziad Abu Eain, was in federal custody here, fighting a losing battle against extradition to Israel, where he was—and is—charged with placing a bomb that killed two children and wounded 36 other civilians on May 14, 1979, in the resort town of Tiberias.

Abu Eain was making regular appearances before federal Magistrate Olga Jurco, who was handling the extradition case. It was during one of these appearances, with Sullivan present, that PLO raiders supposedly would attempt their mission.

At the same time that Sullivan began the conspiracy investigation, he secretly interceded to obtain the release from prison of an informant who had told the Federal Bureau of Investigation about the plot.

The informant was Jerome Radick, a twice-convicted felon with a long record of violence and mental disorders. At 26, he had been arrested at least 20 times in three states on charges including armed robbery, aggravated battery, contributing to the

sexual delinquency of a child, credit card fraud and possession of a controlled substance.

Just 23 days before Sullivan interceded to free him, Radick had been sentenced to two years in federal prison by U.S. District Court Judge Nicholas J. Bua for selling 11 dynamite bombs and two unregistered pistols to a Treasury agent.

While awaiting trial in that case after his arrest on March 19, 1979, Radick was held in the Metropolitan Correctional Center. Abu Eain was put into the same prison five months later, after his arrest at his sister's home here on August 21.

From the prison, Radick called the FBI and said that Abu Eain had enlisted his help in obtaining machine guns for some relatives and friends—supposedly PLO members. The weapons were to be used, Radick said, to kill Sullivan and free Abu Eain when they appeared before Magistrate Jurco.

The FBI sent Special Agent Jerry Howe to the prison several times over several weeks to talk to Radick. Howe proposed that FBI agents pose as illegal weapons dealers to trap the PLO conspirators that Radick said existed.

Before Radick would cooperate in that endeavor, however, he wanted something in return—freedom.

He got it on December 12, 1979, when Sullivan personally appeared before Bua to speak in favor of a motion by Radick to reduce his sentence to the amount of time already served.

Sullivan told Bua that Radick had been "most helpful to us in a very substantial case, and so I told him or his lawyer that I would personally appear before you and tell you how much we appreciated his help, which he didn't have to give, and so, if you think it is consistent with your responsibilities, we would like to see him have a sentence of probation, time served on the time you gave him in jail, with the provision that during his probationary period he may continue to work with the Federal Bureau of Investigation."

Bua granted the motion without hesitation and Radick's attorney, Ronald J. Clark, spent the rest of December 13 negotiating further with Sullivan, various assistants and the FBI about details of Radick's probation and cooperation with the FBI and grand jury.

During these negotiations, Sullivan credited Radick with saving his life and possibly the magistrate's as well, according to Clark, a federal defender panel attorney appointed by Bua to represent Radick.

Clark said that either the same day that Radick was released from prison or "a day or two before," Radick made his one and only appearance before the grand jury that Sullivan had launched into the PLO conspiracy investigation.

When no indictments were forthcoming, Clark said federal investigators told him that the matter was dropped because the relatives and friends of Abu Eain who were supposed to buy the machine guns "withdrew from the conspiracy." According to the investigators, the FBI tape-recorded conversations in which the plotters explained why they were backing out of the plot, Clark said.

"Yassir Arafat [chairman of the PLO] didn't want to create an incident in Chicago while he was negotiating for release of the hostages in Iran," Clark quoted the investigators as saying, "and he thought they [the PLO] should not risk it because Abu Eain might not be extradited anyway."

James R. Fennerty, Abu Eain's lawyer during the extradition process, scoffed at the idea that there was a conspiracy.

"Sullivan was so out to get Ziad that he fell for his story," Fennerty said. "It's like the old shell game. Sullivan got totally shelled—taken in by a man who is mentally deranged."

(The psychiatrist who examined Radick most recently, Dr. Charles B. Kitchen, noted in a report prepared at Judge Bua's request that along with a "severe character disorder that is usually labeled as an asocial personality," Radick "has a tendancy to be manipulative and exploitative.")

Sullivan, now in private practice at the firm of Jenner & Block, refused to discuss Radick, whose release coincided with a brief but violent outbreak of armed robberies in the Bridgeport neighborhood on the Southwest Side.

Victims of the robberies were men who had been drinking late at night in taverns and typically had cashed paychecks in the taverns or displayed substantial amounts of cash.

"The robberies all fit the same general pattern," Assistant Cook County State's Attorney Brian F. Telander explained. "They all occurred about the same time of night and in the same neighborhood, but most of the victims were either too drunk to make identifications or they were jumped in the dark and struck before they got a look at the assailants."

The sixth known victim of such robbery was Walter Konieczka, an elderly man. Late the night of January 13, 1980, he called police to report that he had been robbed and beaten by two young men who had "talked" their way into his home at 4407 S. Honore. He declined medical treatment, but the next day he felt ill and was taken by his brother-in-law to a hospital, where he died of a heart attack. The attending physician said the death resulted from the beating he had suffered the night before.

The seventh and final victim was Leonard J. Biedrzycki, whose job is loading trucks for a steel company. On January 18, 1980, he cashed a vacation check at a tavern, and was planning to leave the next day for the Super Bowl in Pasadena, California. After cashing the check, he went bowling, and then to another tavern at 48th and Paulina, still carrying six $100 bills, a $50 bill and some smaller bills.

When he left the tavern sometime after midnight, to walk to his home three doors south at 4813 S. Paulina, a young man shouted at him, "Stop, I'm a narcotics agent."

As Biedrzycki turned around, the man pulled a knife and pushed him against a wall. An accomplice went through his pockets, taking the cash, and then kneed him in the groin. The robbers fled in a red sedan.

Biedrzycki went inside and called police, who caught two men about 30 minutes later. Police saw the pair get out of a red sedan and start chasing another man—presumably would-be robbery victim number eight. Between them, the two men were carrying, three knives, six $100 bills, a $50 bill and some smaller bills.

Later, Biedrzycki identified the men in a police lineup. They were Jerome Radick and Andrew Miller.

Police matched Miller's fingerprints with prints on an empty beer can found in the late Walter Konieczka's home. And Miller, who in the 1979 trial before Bua was identified as the owner of one of the pistols that Radick sold to the Treasury agent, made an oral statement to police admitting the Konieczka robbery and saying that Radick had beaten the victim.

Two days later, on January 21, a Cook County Grand Jury indicted Radick and Miller for the armed robbery of Biedrzycki and the murder of Konieczka.

In March, they were tried, convicted and sentenced to nine years each for the Biedrzycki armed robbery.

The murder indictments against Radick in the Konieczka case was dismissed because there was no evidence against him except the co-defendant's statement to police, which was inadmissible; Assistant State's Attorney Telander, who prosecuted both cases, said that Radick was indicted in the Konieczka case in the hope that Miller would testify against him, but, when Miller refused, the case had to be dropped.

Miller was found guilty of armed violence in the Konieczka case and sentenced to a six-year term to be served concurrently with his sentence in the Biedrzycki robbery.

The Circuit Court trial judge in both cases, William Cousins, Jr., promptly signed the mittimus for each convicted man, ordering that they be put into custody of the Illinois Department of Corrections.

But to date, only Miller has been put into state custody. More than a year and a half later, Radick still is in the Cook County Jail, which is highly irregular.

Why? A jail official confided that Radick is being kept in Chicago "as a favor to the U.S. attorney—a kind of quid pro quo, because sometimes we need favors from them."

And why would the U.S. attorney's office want Radick here now? "He's going to testify against that Iranian terrorist," said the official.

Could it be *Palestinian* terrorist? "Oh, yeah, that's right, he's going to Israel to testify."

Perhaps, but that's not settled yet, according to Radick's attorney, Clark.

"Something has to be done for Jerry Radick," Clark said. "He could care less whether Israel lives or dies."

CHICAGO, ILL., *February 15, 1982.*

Re proposed extradition legislation.

Hon. WILLIAM J. HUGHES,

Chairman, Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUGHES: I am pleased to respond to your request for my comments on the current proposals to reform the law of extradition. As you may know,

I commented extensively on S. 1639 during the hearing before the Senate Judiciary Committee on October 14, 1981, with respect to the "political offense" exception issue.

Since the Senate hearing, I have reviewed S. 1940, which slightly revised the earlier Senate bill, as well as H.R. 5227, which you introduced on December 15, 1981. Based upon this review, it is my opinion that the approach taken by S. 1940 with respect to the "political offense" exception correctly and fairly resolves the legal and policy issues involved in reforming the extradition laws and should be adopted by the House.

S. 1949

A key provision of S. 1940 would place responsibility for deciding whether extradition is sought for a "political offense" in the hands of the Secretary of State. Critics of the Senate bill, such as the writer of a recent Chicago Tribune editorial, have expressed the fear that, as a result of this change in the law, victims of foreign tyranny may be delivered into the hands of their persecutors on "trumped up" charges because of the "amoral and unjust intricacies of diplomacy." Such criticism is the product of an over-active imagination and grossly exaggerates the changes that the bill would make in the structure of extradition proceedings.

Far from being confined to mere paper-shuffling, as some critics think, our courts will continue to play a central role in the process. Under S. 1940, as in current practice, a judicial hearing before a neutral magistrate must be held to determine whether there is evidence establishing probable cause to believe that an offense was committed and that the person sought committed it. Thus the most basic protection from spurious or "trumped up" charges remains intact.

Nor would S. 1940 strip from courts any power to inquire into the political motivation behind a criminal charge, for the simple reason that courts have never *had* that power. The question of whether an improper political motivation underlies an extradition request has always been decided by the Executive Branch. As the leading case on this point states: "[I]t is not a part of the court proceedings . . . to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State." *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915), aff'd per curiam, 241 U.S. 651 (1916). Critics of S. 1940 proffer no evidence that the Secretary of state has exercised this discretion unjustly.

On the other hand, the definition of what constitutes a "political offense" has routinely been left to the courts. A change is necessary. Recent cases here and abroad have made it increasingly clear that a determination with respect to the "political offense" exception amounts to a major foreign policy event. Rather than a straightforward exercise of judicial authority (interpreting precedent and applying it to the facts), the political offense determination involves fundamental choices about political philosophy and national purpose. Under the Senate bill, this determination would now be made in the same manner as the political motivation determination.

As I have explained in my Senate testimony, U.S. magistrates in two recent cases have held that an unprovoked attack on a British soldier by an IRA gunman is a "political offense" and hence an act worthy of immunity from extradition. If such a violent and dangerous policy is to be adopted, judges should not be the ones to do it.

The drafters of S. 1940 have concluded—and I think properly so—that the decision to shield a terrorist from extradition on the ground that his crime was politically motivated is not the kind of issue which lends itself to resolution through the judicial process. As the New York Times said in its December 29th editorial favoring the proposed legislation, "leaving diplomacy to diplomats provides better and speedier justice."

When all is said and done, most criticism of the Senate approach reflects nothing more than an unfounded distrust of diplomats in general and the present Administration in particular. Ironically, the original version of S. 1940—containing the very same "political offense" provision now under attack—was submitted to Congress by the Carter Administration, whose commitment to human rights is unquestioned.

If anything, political pressure is more often brought to bear on the Secretary of State not to grant extradition than to grant it. For example, a number of Arab ambassadors unsuccessfully pressured Secretary Haig to harbor P.L.O. terrorist Ziyad Abu Eain after the courts in Chicago ordered him extradited to Israel. There is no more basis for the fear that our diplomats will "knuckle under" to requests from authoritarian regimes for extradition of their political opponents than there is for a fear that judges will be bribed by the accused fugitive. Loose speculation about

public officials' motivation is no good gounds for opposition to a useful and needed piece of legislation.

H.R. 5227

While recognizing the flaws inherent in the existing legal test (the so-called *Castioni* test), you would leave the political offense determination in the hands of the courts. This approach is unsatisfactory for two reasons.

First, the bill fails to make clear the extent to which current law is changed and hence leaves the status of the *Castioni* test uncertain. While § 3194(e)(2) specifies that the offense issue "shall be determined * * * in accordance with the * * * principles" contained in subsections (A) and (B), it is unclear whether those principles are intended to entirely displace existing case law or are merely to supplement it. The phrasing of § 3194(e)(2) suggests to me that the offenses enumerated in subsection (A) are "normally" the only ones within the exception.

Second and more fundamentally, the approach of H.R. 5227 does not cure the problems which generated the need for such legislation. A definition which enumerates particular crimes as either being or not being "political offenses" has the benefit of ease of application and would permit the judiciary to continue their present role. This approach, nevertheless, suffers from a serious problem of over-inclusion and under-inclusion, for it totally lacks flexibility.

Hedging the list of included or excluded crimes with words like "normally" or "except in exceptional circumstrances" is not the answer. These phrases provide flexibility but destroy the chief virtue of enumerating the offenses: certainty of result. One cannot have it both ways. With such hedge words in H.R. 5227, courts are once again thrust into making critical foreign policy decisions, and they should simply, not be in that business. The only workable solution is to recognize the definitional muddle and entrust discretion over "political offenses" to the Secretary of State in the same manner as the political motivation issue.

The flaw in the present scheme and in the House bill is precisely illustrated by recent testimony on H.R. 5227 before your Subcommittee. Arguing that H.R. 5227 should not flately exclude murder and other violent crimes from the "poltical offense" exception, Professor Steve Lubet of Northwestern University pointed out that:

"We may not now wish to extend [political offense] protection to factions such as the Red Brigades of Italy, but we should not fashion a definition which also serves to exclude rebels such as the anti-Soviet partisans currently fighting in Afghanistan."

He suggested a looser definition under which:

"The courts would maintain . . . the ability to extend the protection of the exception to those whom we might wish to call legitimate rebels or actual contenders in a national struggle for power."

Professor Lubet's point is a good one but his conclusion is wrong. The United States certainly should be able to distinguish between "good" and "bad" rebels and grant asylum where appropriate, but judges should not be the ones to make that sort of political choice. Any approach to the "political offense" exception which leaves to courts the determination of whether we extradite Red Brigadiers or Afghan guerrillas is a serious misalignment of responsibility.

Accordingly, I urge the Committee to adopt the approach to the "political offense" exception contained in S. 1940.

Sincerely,

WILLIAM M. HANNAY.

CLARK WULF & LEVINE,
New York, N.Y., February 1, 1982.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN HUGHES: Thanks for your leadership in grasping the nettle of extradition law reform. It is a sad commentary on our national commitment to individual freedom that we have tolerated a body of law so irreconcilable with our own Bill of Rights for more than a century without comprehensive reform.

Extradition after all involves not only arrest and deprivation of liberty but the possibility of forced transportation any where on earth for trial before whatever forums there exist governed by whatever principles, or politics. The consequence is

immediately more serious and threatening than arrest on a domestic criminal charge.

In the United States of America, therefore, extradition must be attended with a vigilant concern for human rights and a full respect for rights guaranteed by our Constitution. Otherwise we are faced with the anomaly of a nation conceding to other nations the power to violate rights of people within its own borders that it could not itself constitutionally abrogate.

Constitutional principle should govern extradition. Whenever the freedom of an individual is involved, fundamental rights, not political expediency, should prevail.

While your efforts are none too soon, they come in a time of great international tension and fear when it is most difficult to stand on principle. It is a time when at once it is both most important and most difficult for our country to tell the world we stand on our Bill of Rights and the Universal Declaration of Human Rights.

You have proposed a number of important improvements and safeguards. The Attorney General should be the complaint in all extradition cases. Warrants should be issuable when the location of a fugitive is unknown and summons should be authorized in lieu of warrants where arrest is not necessary. Temporary extradition to the U.S. for trial should be by analogy to the interstate compact procedures for the same purpose. The right to counsel should be fully guaranteed under the Sixth Amendment and by statute. Appeals should be authorized for an accused to afford a fuller range of review, but the right of the government to appeal should be the same as if the alleged offense were against the U.S. Full protection against double jeopardy should be afforded as among foreign jurisdictions and federal and state within the U.S.

The provisions of Section 3198(c) dealing with release during an extradition proceeding should not go beyond constitutional standards of pre-conviction detention. Preventive detention contemplated by the phrase "assure the safety of the community" goes beyond bail standards for the most heinous crime against the United States. This is one of the many illustration of our offering less protection to individual freedom in extradition proceedings for another country than we provide in our own criminal prosecutions. All should be eliminated.

I am concerned about the proposed treatment of cases involving any issue of whether prosecution is on account of political opinions, race, religion or nationality and where extradition may be incompatible with humanitarian considerations. These are set forth in paragraphs (e)(1) (A) and (B) of Section 3194. How can the United States possibly extradite a person for prosecution by a foreign country because of their political opinions, race, religion or nationality? Our constitution prohibits such prosecutions here. Can we honor them abroad by arrest, confinement and involuntary shipment? Can we leave the question to the Secretary of State? Liberty cannot be governed by foreign policies. It must be inviolate. Courts must protect these rights where people are within our country and another requests their bodies. Think only of a South Africa requesting a Black, or a Soviet Union a Jew.

It is not clear what is intended by "humanitarian considerations." If it means any within the Universal Declaration of Human Rights or other international covenants, convention, compacts or treaties dealing with human rights, or rights under our Constitution and laws, then they should be protected by our judiciary. This is the function of our courts. No one should be arrested or extradited in violation of any such laws. If no such laws are violated, then the Secretary of State can in his discretion still decline extradition where treaties reserve that power.

This brings me to the "political offense" section of the bill, paragraphs (e)(2) (A), (B) or (C) of Section 3194. While the provisions seek to preserve some jurisdiction for Courts to protect rights, they fail to understand what is involved and to provide constitutional protection uniformly.

The failure of understanding arises from the tortured history of the "political offense" exception. It is most dramatically exposed by the proposed treatment of possibility of prosecutions of "political opinions" leaving extradition solely to the Secretary of State, while "political offenses" are judged by courts. Can our law accord greater judicial protection for acts than for opinions? The First Amendment has no application?

The effort to inventory crimes to be considered "political" does not address the real concern. The Founding Fathers could not favor extradition for "political offenses" without inferring that other nations should have extradited our revolutionaries within their borders at the request of George III.

The practice of refusing to extradite persons accused of political offenses existed from the beginning of our government. Thomas Jefferson, as our first Secretary of State, proclaimed the practice which has been followed by his successors. See 6 Whiteman, "Digest of International Law at 732; 2 Hyde "International Law" at

1020; E. Clark, "A Treatise Upon the Law of Extradition" 47–49 (1974); I Moore J B A Treatise on Extradition and Interstate Rendition" 304–6, 314–5 (1891). Though early extradition treaties did not contain political acts exceptions the practice was clear:

"Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible . . ." (Letter of Secretary of State Fish to Mr. Hoffman, May 22, 1876; quoted in 2 Hyde, International Law 1020 n.)"

There are important policy reasons supporting the historic United States practice and rule of law prohibiting extradition of political offenders.

International extradition plays an important role in the control of ordinary crime. It provides an essential international cooperation in the apprehension of individuals who have committed acts all nations agree are crimes.

When the acts are political in character, directed against a state and seeking its overthrow, different considerations arise. The historic roots of U.S. refusals to extradite under these circumstances are found in a desire to protect revolutionaries often seeking to overthrow tyranny. As has been noted when considering extradition of political offenders, our government was born in revolution. The policy sought to advance self determination of peoples and avoid taking sides against persons seeking to overthrow a dictatorial government. It was aware; too, that such governments often denied basic rights of fair trial and inflicted cruel and unusual punishments. It was sensitive to the emotion generated by a revolutionary atmosphere.

The sound foundation for the principle is not a sentimental attachment to revolution, or a belief that all governments are repressive. Today we see friendly and unfriendly governments, democratic and authoritarian, alike besieged by political turmoil, revolution and terrorist acts. The question is what principle is most supportive of individual freedom, self determination and peace.

When persons are extradited for political acts, the nation returning them takes sides in an internal political struggle. Only the state can seek extradition. Its colonels may commit atrocities with impunity against the people and the very people who resist may be turned over to the colonels at their request if found in another nation.

If political offenders are turned over to a friendly nation, by what rationale do we decline to return political offenders to unfriendly governments with whom we have comparable treaties? Are treaties, part of the supreme law of the land, to be construed in a consistent manner without regard to the nation involved? If executive discretion is the only protection, what happens to the rights of the individual involved in the struggle?

Nations which extradite persons accused of political offenses against a foreign government on a selective basis, become by that act an enemy of those struggling against the foreign government. Nations which refuse to extradite such persons on a selective basis become by that act an enemy of that foreign government. Both enlarge the area of potential conflict and risk international war. A nation which dares to live by principle, that is by law, will refuse to extradite a person wanted for political acts against a foreign government, whether friend or foe.

Simulteneously such a nation should work for international laws and forums to deal with terrorist acts, human rights violations by governments and war crimes in neutral and balanced proceedings. They alone can protect human rights by offering genuine neutrality, permit self determination by not returning persons to governments they seek to overthrow, yet apply international standards of criminal conduct to both sides. International law can offer peace by avoiding the alignment of nations in internal struggles of other peoples while enforcing international rules protecting universal human rights.

Until such rules can be forged and courts created, the United States should stand on its historic practice and legal principle prohibiting extradition of political offenders in the interest of individual freedom, self determination of nations and world peace.

Last week the world witnessed our President, two days after news accounts described the massacre of 700–900 Salvadoran peasants, find that El Salvador was improving human rights safeguards. How can we possibly let the human rights of people in the United States depend on such a corrupt and dishonest executive fact finding capacity?

If the Secretary of state has absolute power, he will antagonize enemies and please friends who are too often Pinochets, Marco's Shahs, Somozas and other despots. This leads to hostility.

If there is to be international law, then principle, not politics should govern extradition.

I believe the Supreme Court will ultimately decide a person in the United States has as much right to a writ of habeas corpus when a foreign tyrant lawlessly requests a U.S. Marshal to hold him as when a local sheriff does. I would prefer that the Congress proclaim this principle for the people.

Sincerely,

RAMSEY CLARK.

LAW OFFICES OF TOPEL & GOODMAN,
San Francisco, Calif., January 19, 1982.

Re H.R. 5227, International Extradition.

Congressman WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUGHES: Thank you for requesting my comments on H.R. 5227. On the whole, I think H.R. 5227 is an excellent proposal for modernizing international extradition procedures. The bill is, in my opinion, superior to S. 1639 in virtually every respect in which the two bills differ. H.R. 5227 is much more fairly balanced legislation which provides the degree of procedural and substantive fairness to the accused which is often missing in the Senate bill.

If there is support in Congress for some modification of the political offense exception in international extradition proceedings, the provisions of H.R. 5227 are a reasonable attempt to define the scope of that defense. While I do not believe there is a need to include such definitions in the statute—since the judicial decisions on the subject have adequately and fairly defined and interpreted the political offense doctrine—I recognize that some statutory definitional language is probably unavoidable. If that is the case, H.R. 5227 provides a structure for the political offense exception which seems reasonable and flexible enough to permit the judiciary to discharge its decisionmaking responsibility in that area.

The following comments are keyed to the sections of H.R. 5227 which I believe deserve further comment or modification.

3192(a)(2): While this provision is not equivalent to a double jeopardy bar, it will discourage judge shopping where the first extradition request is denied and no new facts can be offered in support of a second extradition request. I think this provision is essential to a fair extradition process and is the best method to prevent government forum shopping.

3192(c): This provision is excellent. It sensibly incorporates mandatory venue transfer to the district where the accused is found and eliminates the unfair burden of a District of Columbia forum for persons residing or found elsewhere.

3192(e): As I stated in my previous letter, the 30-day provisional arrest warrant period suggested in the House draft and even the 45-day period in the present statute are too short. The 60-day provisional arrest period, which is also included in the Senate bill is more realistic.

3194(d)(1)(C): This provision is somewhat peculiar. There is no question that dual criminality is established if the conduct for which the extradition is sought constitutes an offense under the laws of the United States and the demanding country. Incorporation of the reference to the law of the state where the fugitive is found has precedential support in numerous early international extradition decisions which placed far greater emphasis on state law than does modern extradition law. In light of those precedents, inclusion of that provision [(C)(iii)] is not objectionable, although it seems to reintroduce state law concepts that have been largely abandoned in modern federal decisions. I do object to the (C)(ii) provision concerning "the majority of the States". Such a provision strikes me as unreasonably mechanical. I doubt that many magistrates (or, for that matter, many prosecutors) are going to be willing to analyze the law of the fifty states to determine if twenty-six or more states agree on the criminality of particular conduct. If such scrutiny is needed to determine criminality, it strikes me as highly unlikely that the framers of the particular treaty in question (at least on the United States' side) intended that such conduct be a basis for extradition.

If it is the intent of the bill to allow extradition where the present trend in state or federal law is to criminalize the conduct which is the subject of the extradition

request, using a mechanical test such as "majority of the States" is unfair to both the government and the accused. For example, is it fair to the government if 25 states (but not 26) criminalize particular conduct? Likewise, is it fair to the accused if 26 states have criminalized particular conduct by statute but most of those states either have not prosecuted under those statutes because the statutes are archaic, or because the statutes have not been interpreted, or have been given conflicting interpretations?

I believe that the magistrates are capable of interpreting the trends in the law to determine if the conduct is viewed as criminal in this country. I would therefore suggest a more flexible provision than (C)(ii) which would allow the courts to interpret trends in the criminal law without being obligated to rule on the basis of numerical majorities.

3194(d)(2)(A): As I read this section, if the applicable treaty does not specify a statute of limitations defense, the § 3194(d)(2)(A) statute of limitations defense will only be measured by the law of the requesting party. In view of the jurisdictional nature of the statute of limitations in all federal criminal offenses to which a statute of limitations applies, I believe that the five year federal statute of limitations should also be incorporated into this section. I find it unfair to eliminate the bilateral statute of limitations feature from this section when that bilateral feature has almost always been included in the treaties.

3194(e)(2): I am gratified to see that the bill maintains the jurisdiction of the courts to decide the political offense exception in the first instance. As I stated in my previous comments on the draft version of this bill, I believe that inclusion of the word "normally" in (e)(2)(B) recognizes that there may be extraordinary situations in which a court could find that the acts set forth in (e)(2)(B)(i)–(vii) could satisfy the political offense exception.

3194(g)(1)(B): This subsection may conflict with the Federal Rules of Evidence to the extent that Rule 1101(d)(3) states that the Rules do not apply to extradition proceedings.

3195(a)(1): The appeal procedures are a needed and sensible modernization in extradition law for both the government and the accused.

3195(a)(3): This section appears to give the appellate court the power to hold the accused without bail if the Attorney General makes the requisite showing. While inclusion of discretionary language is certainly appropriate, I believe this section should be modified to state that the appellate court can impose any additional bail conditions which will assure the continued presence of the accused rather than simply ordering the accused to be held without bail.

3196(c) (1)–(3): I agree with including some factors in addition to those set forth in the Bail Reform Act. I wholeheartedly agree with the bill's rejection of the outmoded "special circumstances" bail test which appears in the Senate bill. The special circumstances rule as presently set forth in the case law and as described in the legislative history to S. 1639 is unnecessary. The accused in an international extradition proceeding is often either an American citizen or a foreign national living and working openly in this country. Such persons have far less motivation to fail to appear for court hearings than defendants in ordinary criminal cases because: (1) they are trying to convince a judge not to order them extradited to a foreign country. The best way an attorney and his client can convince a judge of the accused's basic trustworthiness is to make sure the accused appears in court as ordered; (2) bail conditions in extradition cases always entail surrender of passports or other travel documents, making unauthorized departure from the country extremely difficult; (3) particularly in the case of United States citizens or foreign nationals living here legally, there is no motive to flee the country, since those persons will be unable to live or work in most other countries without immediate detection and usually with very minimal extradition protections. Under the provisions of the Bail Reform Act, and the additional factors set forth in § 3196(c)(3), very high bail would always be set where the government can adequately establish that the accused was actually fleeing from the demanding country or was otherwise what might be called an international fugitive. It is clear that if the accused has illegally entered the United States, the risk of flight upon release is potentially greater, and bail will undoubtedly be higher. Likewise, if the crime charged is extremely serious and would ordinarily result in very high bail under the day-to-day application of the Bail Reform Act, a similar bail is going to be set for in an international extradition case.

3196(c)(4): I disagree with inclusion of a government right to appeal on the issue of bail. As far as I know, the government does not have such a right of appeal in any other criminal proceeding. I believe a magistrate or district judge is particularly competent to decide the issue of bail. If the government believes that there are addi-

tional facts which were not considered by the judge, the proper procedure as in any criminal case is for the government to present its new evidence to the extradition judge in support of a motion to revoke, increase, or otherwise modify the bail previously set.

I would be happy to discuss the comments further with you or other members of your Subcommittee and staff. If a mutually convenient date can be arranged, I will testify before the Subcommittee in late January or early February.

Thank you again for requesting my opinions about this important legislation.

Very truly yours,

WILLIAM M. GOODMAN.

ALLIANCE FOR PHILIPPINE CONCERNS,
Washington D.C., January 14, 1982.

Representative WILLIAM J. HUGHES,
Chairman, Judiciary Subcommittee on Crime,
Cannon House Office Building, Washington, D.C.

DEAR REPRESENTATIVE HUGHES: We are pleased to learn that your Subcommitte has scheduled hearings on January 26, 1982 to discuss the "Extradition Act of 1981" (H.R. 5227). We hope that your inquiry shall address not only the general significance and implications of the Act and the proposed amendments thereto, but also its particular and concrete effects on millions of people who reside in this country.

One such U.S. constituency that would feel the impact of the Act is the close to a million member Filipino community, consisting of both citizens and non-citizens.

We think that it would be valuable to focus on the Philippines as a case study to show how the proposed Act—unless drafted with judicial protection against political abuse—would allow a repressive foreign government to abridge the constitutional rights of persons living in the United States.

The Philippine situation makes an excellent case study because, at present, the Marcos government has already filed a criminal conspiracy case against—and has announced its intention to seek the return of—40 to 50 anti-Marcos political oppositionists residing in the U.S., including former Senators Benigno Aquino and Raul Manglapus.

This criminal conspiracy case targets almost all the top leaders of the different anti-Marcos groups organized and existing in the United States, charging them with one vast "conspiracy" to overthrow the Philippine government by "assisting" and "supporting terrorist activities" in the Philippines. This conspiracy charge is patently false and political. Many organizations involved are church-related and non-violent as a matter of moral and organizational principle. In addition, there can be no so-called conspiracy among these groups because of widely-known differences among them.

There is, however, a common observation among them: that there is still no genuine rule of law under the Marcos regime but only the unchecked power of Mr. Marcos and the military he commands. Respected international legal and human rights organizations such as the International Commission of Jurists and Amnesty International share this observation and they have decried this absence of the rule of law in the Philippines and the almost total control of Marcos over the courts.

The Marcos charge then is an attempt to silence and intimidate the members of the political opposition living in the United States. While these critics originally dismissed the Marcos charge as no more than political slander and a means of keeping them out of the Philippines, recent developments are now giving them a cause of serious concern. Last November 27, the U.S. government initialed an Extradition Treaty with the repressive regime of Mr. Marcos and this Treaty is now up for ratification in the U.S. Senate. This Treaty, as presently constituted, if reinforced by an extradition process that is without judicial protection against political abuse, will surely provide the dangerous instrument by which political critics of Mr. Marcos living in the U.S. will be delivered to his repressive government in violation of their rights under both the U.S. constitution and international law.

It is also important to emphasize, in this connection, that Mr. Marcos has arbitrarily passed Martial Law decrees which practically convert all political offenses into "criminal acts." This has resulted in his continued and vehement denial, when confronted with documented charges of human rights violations of political prisoners (See Amnesty International's Report on the Philippines, 1975), that there are no political prisoners in the Philippines, but only common criminals charged with violations of specific penal laws.

In a broader sense, the Philippines case illustrates the inherent dangers when attempts are made to transform a judicially-safeguard, politically-neutral extradition process into a foreign policy instrument, subject to all its attendant political shifts. At stake, of course, would be the constitutionally guaranteed rights of residents in this country.

A recent article in the Washington Post (January 3, 1982) reports that "a series of actions by federal officials, * * * have aroused fears of a major crackdown on anti-Marcos activities among the estimated 800,000 people of Philippine descent in this country * * * Anti-Marcos leaders here said they fear the (Extradition) Treaty could be used to extradite several prominent Filipinos wanted on what they call fraudulent charges of murder and other criminal offenses made against them because they oppose Marcos."

Similarly, FBI director William Webster has announced the emergence of two new "terrorist" groups in the U.S.—the Filipinos and the Armenians. (Washington Post, January 1982).

We view these multi-pronged developments with extreme concern. We believe that using the Philippines as a specific case study will deepen and complete any examination of the proposed Extradition Act.

To this end, we wish to propose that you include as a hearing witness, Romeo Capulong, Esq, member of the New York bar, one of the founding members of the Alliance for Philippine Concerns and Chairperson of the Human Rights Committee of the Philippine-American Lawyers Association of New York. Mr. Capulong has studied the Extradition Bills under consideration and has consulted with international law experts on extradition. We believe that he can speak with competence on the issues involved and represent the legitimate concerns of those who will be affected by this Act.

Sincerely yours,

DANTE C. SIMBULAN,
Coordinator, Alliance for Philippine Concerns and
Executive Director, Church Coalition for Human Rights in the Philippines.

ODETTE VILLANUEVA,
Task Force on Extradition Alliance for Philippine Concerns.

LAW OFFICES JENNER & BLOCK,
Chicago, Ill., Nov. 6, 1981.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUGHES: In response to your letter of October 20 regarding the draft bill on extradition, I enclose for your information a copy of a letter which I wrote to Senator Thurmond regarding S. 1639 on October 16, 1981. As you can see, I am opposed to permitting the courts to decide the "political offense" issue. My opposition is based on my experience in the *Abu Eain* case, and from reading the diverse—and often conflicting and erroneous—rulings on this touchy issue.

Yours truly,

THOMAS P. SULLIVAN.

LAW OFFICES JENNER & BLOCK,
Chicago, Ill., Oct. 16, 1981.

Re S. 1639

Hon. STROM THURMOND,
U.S. Senator, Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of September 29, 1981 regarding S. 1639, the Extradition Act of 1981. I served as United States Attorney in the Northern District of Illinois from July, 1977 through April, 1981. During that time, I personally handled the trial of the Ziad Abu Eain extradition case which is referred to in footnote 57 of the materials you sent me (Congressional Record, page S. 9959). As a result of my experiences in that case, I strongly support the enactment of S. 1639, particularly insofar as that statute authorizes the government to take a direct appeal from the decision of the trail judge, and prohibits the courts from determining the "political offense" issues which are often raised in extradition cases. The reasons for my support of these provisions are set forth in some length in a letter I wrote to Attorney General Benjamin R. Civilette on October 16, 1979, but I do not feel free to disclose to you the text of that letter since it was an intra-office

communication within the Department of Justice. Perhaps you can optain a copy of the letter from the Attorney General, or obtain the Attorney General's permission for me to deliver a copy to you.

I do have a suggestion for an amendment to Section 3194(a). I recommend that the following bracketed language be added to the existing language which is not bracketed:

"The court * * * does not have jurisdiction to determine [whether the request for extradition has, in fact, been made with a view to trying or punishing the extraditee for an offense of a political character, or] whether the foreign state is seeking the extradition of the person for a political offense or for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions. * * *"

The reason for the added language is that nearly every extradition treaty currently in effect contains a phrase to the effect that "a person may not be extradited if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him (the extraditee) for an offense of a political character." With the additional phrase which I have suggested, the proposed extradition amendments will clearly establish that the Judiciary has no role whatsoever in determining the applicability of any so-called "political offense exception" found in any existing treaty.

Along these same lines, I recommend that Section 3196(a)(3) be amended to have the following bracketed language added to the existing language which is not bracketed:

"The Secretary of State * * * may decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character or for the purpose of prosecuting or punishing the person for his political opinions [or where the Secretary is persuaded that the person sought has established that the request has in fact, been made with a view to trying or punishing the extraditee for an offense of a political character]."

I am of the firm belief that the passage of S 1639 will greatly improve the procedures which govern extradition cases, and will advance the cause of justice from the viewpoint both of the government and the public as well as the person whose extradition is being sought.

I will be glad to provide any further information which I can.

Yours truly,

THOMAS P. SULLIVAN.

JENNER & BLOCK,
Chicago, Ill., January 18, 1982.

Hon. WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUGHES: I have reviewed H.R. 5227, the bill which you introduced on December 15, 1981 dealing with extradition law. I am in favor of your bill, and I think it embodies many needed reforms to our present extradition law. Personally, I would prefer that the courts have nothing to do with the determination as to whether an offense is "a political offense," but rather that this determination be left to the Secretary of State. However, your bill contains such restrictions upon the court's authority in this regard that I believe it is a satisfactory resolution of that problem.

Respectully yours,

THOMAS P. SULLIVAN.

UNIVERSITY OF HOUSTON,
Houston, Tex., November 12, 1981.

Representative WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime,
House Committee on the Judiciary, Washington, D.C.

DEAR CHAIRMAN HUGHES: Thank you for your letter earlier about the proposed legislation concerning the law of extradition. Time does not now permit extensive comment, but I would like to look into this matter more thoroughly later. For now, may I make two suggestions?

With regard to the Committee "Discussion Draft [26 October 1981]", Section 3194, at page 8, line 24, could you add "international law and/or" to that line so as to read: "punishable under international law and/or the laws of—" Reason: with this language it would be clearer that extradition to an international tribunal prosecuting for violations of international law and to a foreign state prosecuting violations of international law over which it has universal jurisdiction is permissible whether or not a violation of foreign state law is the theoretic basis for foreign state jurisdiction and whether or not an international tribunal might later come into existence and there are other concerns about extradition to such an entity.

With regard to the same draft, Sec. 3196(b)(2), on page 12, line 21, wouldn't it be wise to include two additional sections (new F & G, change present to F to H) which read:

"(F) an offense involving any serious violations of human rights;"

"(G) any other offense against the law of nations punishable as a criminal offense under international law; or"

Reason: this rounds out the exceptions to the political offense exception, covers offenses not listed in the present and incomplete list, and fits newer case developments. Otherwise, certain international law violations will still be considered to be "political offenses" despite the obvious fact that any violation of international law should not be so classified for domestic law purposes.

Thanks.

Sincerely,

JORDAN J. PAUST,
Professor of Law.

HOUSE OF REPRESENTATIVES,
Washington, D.C., September 30, 1981.

Hon. WILLIAM J. HUGHES,
U.S. House of Representatives,
Washington, D.C.

DEAR BILL: The following resolution was sent to me by Dean Richard Huber of Boston College Law School. It was adopted at the Fourth Annual Conference of the International Association of Jurists, Italy-U.S.A.-Switzerland. I told Dean Huber I would pursue this with some members of the Judiciary Committee who might have some expertise in this subject. I would be interested in your opinion on the matter.

The resolution was presented to Anthony General Smith two weeks ago and I don't know if any expression on the matter from the Committee would be appropriate. I'd appreciate knowing what you think.

BARNEY FRANK.

RESOLUTION

Whereas, the Fourth International Conference of the International Association of Jurists Italy-U.S.A.-Switzerland was held at Boston, Massachusetts, September 8–9, 1981, on the subject of international judicial assistance.;

Whereas, it is the resolution of the Association that this body should strive to have a better understanding of the legal systems of one another so as to promote the universal principles of law common to those systems, and to further judicial assistance and cooperation between the judicial and executive authorities of the countries involved;

Whereas, it is the resolution of the Association that the existing legal regime between the United States and Italy in the area of extradition requires revitalization and strengthening so as to combat more effectively international terrorism and criminal activities affecting the Italian and the American people and the public order in both countries;

Now therefore, it is hoped, and it is hereby recommended, that the Governments of the United States and Italy will strive to reformulate Articles 5 and 12 of the existing Extradition Treaty between the two countries to the end that the judicial authorities of the two countries, in passing upon extradition requests, limit their examination of the validity of an extradition request to the arrest orders issued by the authorities of the requesting country and the prima facie evidence submitted in support thereof, and avoid a reexamination of the merits of the guilt or innocence of the person sought to be extradited which, in the past, has on occasion served to defeat valid extradition requests thereby impeding the administration of justice in the requesting State.

UNIVERSITY OF HOUSTON,
Houston, Tex., September 22, 1981.

Subject: Terrorism legislation.

Representative WILLIAM J. HUGHES,
Chairman, Subcommittee on Crime, House Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUGHES: With regard to recent efforts to draft legislation concerning acts of extraterritorial terrorism, may I suggest the enclosed draft legislation prepared for the American Society of International Law study group, while under contract with the State Department?

Also, would you be so kind to provide me with any relevant drafts of proposed legislation? I am writing an article for Michigan's *Yearbook of Int'l Studies* on extraterritorial jurisdiction over terrorist acts and would find such material useful.

Thank you very much.

Sincerely,

JORDAN J. PAUST,
Professor of Law.

[Extract from A. Evans & J. Murphy (eds.), Legal Aspects of Transnational Terrorism 393–394 and 610 (A.S.I.L. 1978)]

PROPOSED FEDERAL LEGISLATION TO ACQUIRE JURISDICTION OVER AND PROSECUTE ACTS OF INTERNATIONAL TERRORISM

(NOTE.—This first draft can be expanded to include an extraterritorial "aiding and abetting" or "conspiracy" in connection with transnational acts of terrorism as defined by the Act.)

A BILL To amend title 18, United States Code, to provide a penalty for the commission of acts of international terrorism at home or abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Chapter 7 of title 18, United States Code, is amended by adding after section 114 the following new section:

"§ 115. Commission of International Terrorism

"(a) Whoever assaults, strikes, wounds, kidnaps, imprisons, or threatens violence to another human being within the ordinary jurisdiction, and special maritime and territorial jurisdiction of the United States, or whoever does so abroad, and thereby commits an act of terrorism against a U.S. citizen or in any manner contrary to international law, shall be fined not more than $10,000, or imprisoned for not more than ten years, or both.

"(b) Whoever commits an act of terrorism proscribed above which leads to the death of another human being shall be subject to a penalty of death or life imprisonment.

"(c) As used in subsection (a), the term—

"(1) 'terrorism' means any intentional use of violence or a threat of violence by the accused against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target through intense fear or anxiety;

"(2) 'in any manner contrary to international law' means in any manner contrary to treaty law to which the United States is a party or customary international law, e.g., treaty and customary law prohibiting terrorism against the civilian population in time of armed conflict or in a manner prohibited by general human rights law:

"(d) As used in subsection (c), the term—

"(1) 'instrumental target' means a human or nonhuman target which is assaulted, struck, wounded, kidnapped, imprisoned or detained, or threatened with violence in order to communicate the threat of future violence to and coerce some primary target. In some cases, the instrumental target and the primary target could be the same person.

"(2) 'primary target' means a human target which is the intended victim of terroristic coercion.

COMMENT

Jurisdiction is now obtained over acts of terrorism committed against United States citizens abroad for which there had previously been no federal jurisdiction. Jurisdiction, under international law, is permissible under the nationality and pro-

tective theories of jurisdiction; while passive personality theory is not specifically adopted, it would also support such a jurisdictional basis under international law. There can be no doubt that with increasing terroristic threats against United States citizens abroad, that the United States has significant security and protective interests at stake.

Reference to international law in supplementation of jurisdiction over acts of terrorism committed against United States citizens will assure United States ability to effectively implement several international treaties relating to this crime and the general customary international norms which are also violated by acts of international terrorism. Other federal provisions use international law as a standard; for example, federal law punishing acts of piracy and war crimes.

Reference to "international" terrorism is necessary so as to assure that the United States does not impermissibly interfer with some activity which is *primarily* within the domestic jurisdiction of another state. The term "international" does not have to be defined, but would refer to acts with international impact or effect such as attacks against United States citizens within a foreign country, attacks against foreign diplomats in a foreign country (using international treaty and customary law as a jurisdictional base), significant acts of terrorism committed abroad but with significant international impact or effect, significant acts of terrorism committed abroad against foreign nationals but in violation of international treaty law which authorized universal jurisdiction over prosecution of the offense, and so forth.

NOTE.—On the above principles of jurisdiction, see also: 2 Houston Journal of International Law 239–245 (1979).)

II. Proposed Federal Legislation to Proscribe Activities in Connection with certain illegal weapon systems:

Any person who manufacturers, produces, or sells weapon systems for use against human beings or uses them to kill or injure a human being when such weapon systems are proscribed for use against human beings under international law, shall be fined not more than $10,000 per incident or imprisoned not more than 10 years, or both; but if death results, such person shall be subject to imprisonment for any term of years or for life. This provision shall have extraterritorial effect to the extent that such is consistent with international law.

WHEN EXTRADITION LAWS ARE TAINTED BY A COUNTRY'S POLITICS

To the Editor:

As one of the attorneys in the case of Ziad Abu Eain, a 22-year-old Palestinian whom U.S. authorities extradited to Israel on Dec. 12, 1981, to stand trial on charges arising out of a bombing in Israel on May 14, 1979, I am writing to respond to a Dec. 29 Times editorial [which dealt with that case and with the case of Desmond Mackin, an Irish Republican Army member].

First, I was genuinely shocked that you would write a lead editorial about the case when The Times, in the more than two and a half years the case was before U.S. courts and the Secretary of State, did not think it necessary to report on its important issues.

Second, your editorial regards the U.N. General Assembly human rights resolution of Dec. 16 relating to the case of Abu Eain—passed 75 to 21—as just another manifestation of "animus toward Israel." I think that you misread the experience of many countries in the world with extradition laws and procedures and their understanding of the time-honored, judicially evolved and codified principle of the nonextraditability of persons charged with "offenses of a political character."

The American judiciary has without substantial deviation adopted the standard set forth in English law, where the term "political offense" has *uniformly* been construed to encompass those offenses that are "incidental to serve political disturbances such as war, revolution and rebellion." Both recent cases involving members of the I.R.A. (Mackin and McMullen) upheld that principle.

The principle, however, was deviated from in the Abu Eain case because of the State Department's decision to make known to the court its views on the legal issue involved, thus politicizing the question of what constitutes an "offense of a political character."

The department's involvement in the Abu Eain extradition hearing further undermined the ability of defense counsel to question the validity of the evidence Israel was presenting.

Coupled with the State and Justice Departments' efforts to remove from the jurisdiction of our Federal courts the decision whether an offense upon which an extradi-

tion request is based is of a political character is the Senate Judiciary Committee's consideration of a bill that would accomplish the same result. If these efforts are successful, extradition decisions in political cases will be totally politicized and the American people will become direct party to foreign conflicts.

Indeed, in the Abu Eain case we have the first judicial precedent of the extradition of a person alleged to have been a member of a mass-based guerrilla movement for trial under the common criminal laws of the country against which the act was alleged to have been directed. The reaction of the majority of the people in the world is the U.N. resolution.

The editorial does not seriously discuss the issues posed by the recommendation to politicize the extradition process, although it essentially support such action. I believe the public should know the pros and cons before such measures are adopted, either by the courts or the Congress.

Despite the editorial's dismissal of the U.N. resolution, the fact remains that such actions as the extradition of Abu Eain hold American judicial and diplomatic proceedings up to rebuke and endanger American interests abroad. The "political incidence test" was well considered and had strong policy bases. The Abu Eain extradition decision and its aftermath, which has not yet run its course, point this up only too well.

ABDEEN M. JABARA.

DETROIT, MICH., *January 6, 1982.*

[From the Congressional Record, Dec. 15, 1981]

EXTRADITION REFORM

(Statement of Hon. William J. Hughes of New Jersey)

Mr. HUGHES. Mr. Speaker, today I am introducing a bill to reform the laws of the United States with respect to extradition. Current extradition laws have been on the books for well over a century and have never been reviewed in a comprehensive fashion. According to both the Departments of Justice and State and leading practitioners and academics, these provisions are not adequate in dealing with international crime control. The bill I am offering for introduction is designed to facilitate reform in this area. The Subcommittee on Crime, which I chair, will hold a hearing on this bill in the near future.

Increased ease and frequency of intercontinental travel has created international law problems that were unforeseen by the Congress of the 19th century. In recent years there has been a dramatic increase in the number of extradition requests made by foreign countries for terrorists and for persons involved in drug trafficking. Improved international cooperation is prosecuting these types of offenses will very likely produce an even greater level of extradition demands in the future. The current procedures carry forward the anomalies of a bygone era. The inconveniences caused by these statutory deficiencies are relatively minor now, but are likely to cause major problems in the future.

In addition, the United states has undertaken negotiations and executed new extradition treaties that cannot be fully implemented under present law. The modernization of extradition procedures would be an important step forward in implementing these international obligations.

This bill has been developed with the assistance of the Departments of Justice and State. Many of the ideas for reform in this area have come directly from their suggestions. Among the suggestions made by the administration that have been incorporated are the following:

First, require that the Attorney General act as complainant in extradition matters. Under current law a foreign government—or someone claiming to be acting on behalf of such government—can initiate an extradition proceeding. The suggested change is recognized practice in virtually every othr country. The proposed change will also avoid foreign policy problems that arise under current law.

Second, permit an arrest warrant to be issued when the location of the fugitive is not know. This procedure will facilitate the efforts of law enforcement in locating persons sought for extradition, including suspected terrorists.

Third, permit the commencement of extradition proceedings upon the issuance of a summons. This procedure is appropriate when the fugitive's location is known and the risk of flight is small. This procedural device will also save money.

Fourth, set standards for the release of a person sought for extradition. Under current law there is no explicit treatment of the question of when and whether to

release a person sought for criminal activity by a foreign government. The absence of statutory criteria for use by the courts has produced some inappropriate results. The proposed release criteria takes into account the dangerousness of the accused person, ties to the community, seriousness of the offense, and the need to honor our solemn treaty obligations.

Fifth, permits fugitives to be temporarily extradited to the United Strates for trial and sentencing. This change will assist law enforcement by allowing timely disposition of violations of American law. Under current law we would have to wait until any foreign sentence was served.

Sixth, establishes the right to counsel of accused persons and authorizes the appointment of counsel for indigents.

Seventh, clarifies the requirements of double criminality. International law and our extradition treaties require that the offense that is the subject of the proceeding be an offense in both the requesting State and the United States. The bill clarifies current law by providing that the alleged offenses must be an offense similar to a crime against: A majority of the States or the United States; the United States; or against the laws of the State in which the suspect is found.

Eighth, permits either party to appeal the decisions of the district court. Under current law neither side may appeal. As a practical matter, however, the defendant can obtain review through habeas corpus proceedings, and the Government by commencing a new proceeding. Direct appellate review will be more efficient.

Ninth, clarifies or codifies current extradition practices and sets forth clear procedures for use by the courts and the Attorney General.

There is one area where the bill differs from the previous recommendations of the Departments of Justice and State; treaties of the political offense exception and the application of defenses to extradition. Under current law virtually all of our extradition treaties provide that the United States does not have an obligation to return an alleged offender who has committed a political offense. The Federal district courts generally make this determination under current law. The administration wants to change this practice to vest these determinations in the discretion of the Secretary of State.

The bill I am introducing leaves the authority for making decisions about political offenses with the independent judicial branch. While there are legitimate concerns about the possible adverse consequences of the current practice on the political offense question, I believe they are adequately addressed in the bill. The bill sets forth for the first time in Federal law clear statutory criteria for the courts to use in determining a safeguard against possible abuse by guaranteeing the Government the right to appeal. These two changes should resolve most of the objections the affected agencies have to current law. If the witnesses at our forthcoming hearings offer persuasive reasons for modifying the current law, then such a change in the bill will be made. I am confident that any bill that emerges will fashion an appropriate balance between the rights of the accused and the foreign policy needs of our Government.

I extend an invitation to interested parties to comment on this bill. Comments or requests to testify should be made to the Subcommittee on Crime, 207 Cannon House Office Building, Washington, D.C. 20515 or telephone: 202/225–1695.

[From the Congressional Record, May 13, 1982]

H.R. 6046—The Extradition Act of 1982

(Statement of Hon. William J. Hughes of New Jersey)

Mr. Hughes. Mr. Speaker, on March 24, 1982, the Subcommittee on Crime, which I chair, reported to the full Judiciary Committee my bill, H.R. 6046, the Extradition Act of 1982. This bill represents the first comprehensive reform of the extradition laws in over a century. As it is with many attempts at comprehensive reform, this bill has generated a fair amount of controversy. I have previously included in the Record a brief description of the important features of the bill. See *Congressional Record,* December 15, 1981, at E5877. However, because of the large volume of mail from constituents of many Members on this bill, I felt it would be appropriate to answer some of the questions that come up most frequently.

What is the basic purpose of the bill? H.R. 6046 creates a modern and coherent set of procedures for the executive branch and the courts to use in processing requests by foreign governments for the return of persons accused of committing crimes in foreign countries. The United States has a treaty obligation to extradite

such persons if the requirements of the treaty and international law are complied with.

Why is such legislation necessary? The current Federal law has not been comprehensively reviewed in over 100 years. Current law contains a large number of antiquated provisions and anomalies. For example, under current law neither the person being sought or the government can appeal an extradition decision. The bill cures this and other defects of current law in a manner that is generally acceptable to the Departments of Justice and State as well as to persons representing persons sought for extradition.

Does the United States have a treaty obligation to extradited persons who are being sought for political offenses? All of the extradition treaties to which the United States is a party contain an exception to the extradition obligation for persons who have committed or are being sought for a political offense. This so-called political offense doctrine serves to guarantee that our Government will remain neutral with respect to the internal political disputes of foreign countries. Just as it would have been inappropriate for France to return George Washington to England for a criminal trial during the Revolutionary War, we should not be forced to take sides in another country's civil war. As a general matter, the political offense exception has been defined by the courts to include both free speech or political advocacy crimes as well as certain crimes of violence that are politically motivated.

Who decides whether a person is being sought by a foreign state for a political offense? Under current law this decision is left to the discretion of the courts. Under the provisions of H.R. 6046, as well as its predecessor bill, H.R. 5227, this question will be decided by the Federal courts. Current law is improved by the addition of legislative guidance as to the meaning of the concept of a political offense.

H.R. 6046 retains current law because the subcommittee concluded that there was a strong showing that the detachment and neutrality of the judiciary is necessary to preserve the political and human rights of persons being sought for extradition. Because extradition involves removal of a person, including U.S. citizens for trial in a foreign country upon a mere showing of probably cause, we felt that some rudimentary due process protections should be required.

The position of the administration on this issue is that the Secretary of State should decide—without any judicial review—whether a person being sought for extradition has committed a political offense. This position is embodied in S. 1639, and S 1940, as introduced, by Senator Thurmond.

What relationship does the legislation have with a pending extradition treaty with the Philippines? The administration has negotiated, but has not yet officially sent to the Senate, an extradition treaty with the Republic of the Philippines. One of the provisions of the proposed treaty is that political offense questions are to be decided by the Secretary of State. Any conflict between this treaty provision and any domestic law would be decided according to which act occurred later in time. The administration has indicated to me informally that in the event that the House version of the Extradition Reform Act passes that the proposed extradition treaty with the Philippines will not be submitted until the decisionmaking authority on the political offense question has been changed to preserve the role of the courts.

What is the status of the legislation? H.R. 6046 has been successfully reported by the Subcommittee on Crime and is awaiting action in the full Judiciary Committee. S. 1940 by Senator Thurmond has been reported (see S. Rept. No. 97-331) and on April 19, 1982, was suquentially referred to the Senate Committee on Foreign Relations for 30 days. The Senate version of the Extradition Reform Act provides that the political offense question shall be decided by the Secretary of State using the legislative guidance as is found in the House bill. Unlike the original Senate bill, the bill as reported provides that the decision of the Secretary of State on the political offense question is judicially reviewable by an appropriate U.S. Court of Appeals using a substantial evidence test.

What other controversial issues are raised by this legislation? Some of the constituent mail has raised questions about three other issues relating to extradition. One concern related to the potential unfairness of the criminal tribunal that the person will be returned to. Under a well-established rule of law, American courts have refrained from inquiring into the fairness of the court procedures to be applied in the foreign country. *Neeley* v. *Henkel*, 180 U.S. 109 (1901); *Gallina* v. *Frazer*, 278 F. 2d (2d Cir. 1960). This is not to say, however, that the person being sought has no protection from abusive treatment by the foreign country. First, we should enter into extradition treaties only with those countries with legal systems that provide some fundamental fairness. For example, we do not have an extradition treaty with the Soviet Union. To the extent that we have existing extradition treaties with countries with a less than perfect record concerning the protection of human rights,

there are two other steps that can be taken. First, we can renegotiate such treaties, or if that is not possible, terminate the agreement. Second, the Secretary of State has broad discretion in deciding whether to proceed with the extradition request. Moreover, even if extradition is permitted by the courts, the Secretary can condition such person's return upon an agreement by the foreign country to treat the person in a particular fashion; for example, no trial by any ad hoc court.

H.R. 6046 preserves the current rule of noninquiry into the procedures used in the foreign state, but in light of the other significant departure from this rule of noninquiry would inappropriately involve American courts in evaluating the fairness of other countries legal systems. Such a result would be nearly impossible to achieve without both embroiling our country in sensitive political judgments about the relative merits of other countries laws and mores. Decisions about whether or not to have an extradition relationship with a foreign state are best left to the treaty ratification process and the discretion of the Secretary of State.

Another concern raised in some constituent mail relates to the question of whether the courts should have some role in determining whether the person is being sought by the foreign country based upon political motives. A similar set of considerations apply here as with the rule of noninquiry. Judgments about the political context or motivation of the requesting state in making the extradition request have traditionally been left with the discretion of the Secretary of State. Unlike the political offense exception, which usually involves a subjective assessment of the state of mind of the alleged offender, the question of the motive of the requesting country involves a subjective evaluation of the state of mind of a foreign government. This type of judgment is not appropriate for judicial assessment. It is one thing to ask the courts to look into the motive of an individual offender, it is quite another matter to require them to make what are essentially foreign policy judgments. *Abu Eain* v. *Wilkes*, 641 F. 2d 504 (7th Cir. 1981), cert. denied, ——— U.S. ——— (1981; *Garcia-Gullerin* v. *United States*, 450 F. 2d 1192 (5th Cir. 1971); In re *Lincoln*, 228 Fed. 70, 74, aff'd per curiam, 241 U.S. 651 (1916).

What is the position of the administration on the House bill? The administration prefers to have the question of whether a person committed a political offense to be decided by the Secretary of State without any judicial review or jurisdiction.

The only other issue raised by the Justice Department relates to release pending an extradition hearing. Under current Federal law there is no statutory right to release pending an extradition hearing. The courts have pointed to their inherent power to justify the release of persons based upon a showing of special circumstances. *Wright* v. *Henkel*, 190 U.S. 40, 62-63 (1903). The subcommittee concluded that the standards for release under current law should be clarified. As a result the provisions of H.R. 6046 permit a person being sought for extradition to apply for prehearing release. The bill recognizes the fact that the United States may not have sufficient information about the person being sought at the time of the initial request because of the de jure complainant is the foreign government. Thus, for the first 10 days after arrest, the burden of proof is on the person being sought to establish that he or she can be released without risk. After the expiration of 10 days, or the receipt of a complete set of information from the foreign government, the burden of justifying detention is on the government.

H.R. 6046 does not apply the same bail rules or procedures as are used in domestic criminal cases. Our treaty obligations impose a legal duty on the United States to make our best efforts as securing the return of alleged fugitives. The failure to return such persons because of flight from an extradition hearing could have deleterious consequences both in terms of treaty compliance and—as a practical matter—with respect to subsequent American extradition from that foreign country.

The differences between extradition cases and domestic criminal cases is recognized in the legislation in two important ways. First, the bill provides for a shifting burden of proof based on the likelihood of information being available. Second, the courts are instructed not to release a person being sought for extradition if such a person is: a flight risk; a danger to the community; or such release would jeopardize an extradition treaty relationship with a foreign state.

The Department of Justice apparently would prefer to have the burden of justifying release always remain with the person being sought for release. This preventive detention approach seemed to the subcommittee to tip the balance of liberty considerations too far against the individual. In addition, the subcommittee felt that the release considerations outlined above sufficiently took into account the unique nature of extradition proceedings. Finally, the inclusion of a Government right to appeal release decisions should eliminate the possibility of erroneous release decisions.

What are the differences between the bill as originally introduced, H.R. 5227, and the bill as reported by the Subcommittee on Crime, H.R. 6406?

First, a new section 3197 on transit extradition has been added at the suggestion of the Justice Department. This section provides that the United States may cooperate with the movement of persons through the United States to assist extradition to a third country.

Second, a new subsection (f) is added to section 3199 to authorize the Supreme Court to issue rules of practice and procedure.

Third, several minor changes are made to make clear the intention of the drafters that the Secretary of State has an adequate period of time to evaluate claims that a person found extraditable by the court should nonetheless not be extradited for some other reason.

Fourth, the requirement of dual criminality is amended to provide that, in addition to requiring that an offense that is the basis for an extradition request is a violation of the criminal law of both countries, the alleged criminal conduct must also be the subject of serious penal treatment. The amendment requires that the crime for which extradition is being sought be punishable by more than 1 year in jail—when the person is to be prosecuted—or 6 months in prison—if the person has already been convicted and is being returned to serve a sentence.

Fifth, an amendment to limit the use of provisional arrests to 60 days, regardless of whether the extradition treaty provides otherwise.

Sixth, three amendments are made to improve the procedure for decisionmaking with respect to determinations on the political offense exception: To allow either party to move to have such cases decided only by the district court; to preclude the introduction of political offense exception evidence until the person being sought is found otherwise extraditable, and to place the burden of proving the application of the political offense exception on the person being sought by a preponderance of the evidence.

Seventh, an amendment to set forth criteria to be used by the Secretary of State in assessing the order of priority to give to competing extradition requests for the same person.

Eighth, an amendment to the general provisions, section 3199, to clarify the statutory release criteria for persons awaiting an extradition hearing.

Any Member wishing to obtain further information on this bill should contact the staff of the Subcommittee on Crime; majority—51695, 207 Cannon or minority—57087, 111 Cannon.

The description referred to follows:

EXTRADITION REFORM

Mr. HUGHES. Mr. Speaker, today I am introducing a bill to reform the laws of the United States with respect to extradition. Current extradition laws have been on the books for well over a century and have never been reviewed in a comprehensive fashion. According to both the Departments of Justice and State and leading practitioners and academics, these provisions are not adequate in dealing with international crime control. The bill I am offering for introduction is designed to facilitate reform in this area. The Subcommittee on Crime, which I chair, will hold a hearing on this bill in the near future.

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In addition, the United States has undertaken negotiations and executed new extradition treaties that cannot be fully implemented under present law. The modernization of extradition procedures would be an important step forward in implementing these international obligations.

This bill has been developed with the assistance of the Departments of Justice and State. Many of the ideas for reform in this area have come directly from their suggestions. Among the suggestions made by the administration that have been incorporated are the following:

First, require that the Attorney General act as complainant in extradition matters. Under current law a foreign government—or someone claiming to be acting on

behalf of such government—can initiate an extradition proceeding. The suggested change is recognized practice in virtually every other country. The purposed change will also avoid foreign policy problems that arise under current law.

Second, permit an arrest warrant to be issued when the location of the fugitive is not known. This procedure will facilitate the efforts of law enforcement in locating persons sought for extradition, including suspected terrorists.

Third, permit the commencement of extradition proceedings upon the issuance of a summons. This procedure is appropriate when the fugitive's location is known and the risk of flight is small. This procedural device will also save money.

Fourth, set standards for the release of a person sought for extradition. Under current law there is no explicit treatment of the question of when and whether to release a person sought for criminal activity by a foreign government. The absence of statutory criteria for use by the courts has produced some in appropriate results. The proposed release criteria takes into account the dangerousness of the accused person, ties to the community, seriousness of the offense, and the need to honor our solemn treaty obligations.

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Ninth, clarifies or codifies current extradition practices and sets forth clear procedures for use by the courts and the Attorney General.

There is one area where the bill differs from the previous recommendations of the Departments of Justice and State; treatment of the political offense exception and the application of defenses to extradition. Under current law virtually all of our extradition treaties provide that the United States does not have an obligation to return an alleged offender who has committed a political offense. The Federal district courts generally make this determination under current law. The administration wants to change this practice to vest these determinations in the discretion of the Secretary of State.

The bill I am introducing leaves the authority for making decisions about political offenses with the independent judicial branch. While there are legitimate concerns about the possible adverse consequences of the current practice on the political offense question, I believe they are adequately addressed in the bill. The bill sets forth for the first time in Federal law clear statutory criteria for the courts to use in determining a safeguard against possible abuse by guaranteeing the Government the right to appeal. These two changes should resolve most of the objections the affected agencies have to current law. If the witnesses at our forthcoming hearings offer persuasive reasons for modifying the current law, then such a change in the bill will be made. I am confident that any bill that emerges will fashion an appropriate balance between the rights of the accused and the foreign policy needs of our Government.

I extend an invitation to interested parties to comment on this bill. Comments or requests to testify should be made to the Subcommittee on Crime, 207 Cannon House Office Building, Washington, D.C. 20515 or telephone: 202/225–1695.

[From the New York Times, Jan. 11, 1982]

Politics Has No Place in Our Extradition Law

To the Editor:

Your Dec. 29 editorial objecting to the protection which terrorists sometimes receive from the current law of extradition was both right and wrong.

You were right to argue that terrorists who flee to the United States should not be shielded from return simply because their crimes were politically motivated.

There is nothing redeeming about random bombings and killings for the sake of political change.

However, you were wrong to suggest that the best way to deny terrorists this protection is to strip the courts of jurisdiction to administer the political crimes defense to extradition and to transfer administration of that defense to diplomats. That would lead to the exchange of political refugees in the manner that baseball teams swap players.

Your proposal, embodied in a bill (S. 1639) now before Congress, also would violate the Constitution. The United States has an obligation, under the due process clause of the Fifth Amendment, not to be complicit in the political persecution and injustices of foreign legal systems, an obligation very much like the duty imposed by the writ of habeas corpus, which empowers courts to protect aliens and citizens alike from arbitrary imprisonment within the U.S.

To strip the courts of authority to examine why a foreign government wants someone to be seized within the United States and transported abroad for trial, incarceration and perhaps death would be akin to suspending that Great Writ.

Unfortunately, nearly everyone, including the courts, seems to have forgotten why the political-crimes defense became a standard provision of our extradition treaties, starting in the mid-19th century.

The defense was adopted both because Americans were revolted by the injustice of foreign legal systems and because they wished to give sanctuary to foreign revolutionaries like Kossuth, Mazzini and Garibaldi, who, like the Minutemen of Lexington, killed in what came to be seen as a good cause. Senate ratification of the first extradition treaties was conditioned on the inclusion of provisions for the judicial administration of the political-crimes defense.

Only later did American courts make the mistake of extending the defense to anyone who commits a politically motivated crime in the course of an uprising. This unnecessary broad interpretation, not required by the language of the treaties and adopted in blind imitation of foreign court cases, is the primary reason why I.R.A. gunmen and Yugoslav war criminals sometimes win sanctuary within the United States.

Worse still, American courts refuse to question the motives of foreign prosecutors seeking the extradition of political fugitives for allegedly "ordinary crimes," such as embezzlement. Since the U.S. has extradition treaties with more than 100 countries, including Albania, this "rule of non-inquiry" has the effect of making our courts potential instruments of foreign repression.

Implicit in your editorial is an indifference, even a hostility, toward extraditees, as if all of them are aliens and terrorists unworthy of much "judicial solemnity." This is not true. U.S. citizens are as vulnerable to extradition as aliens, and most political refugees who would be imperiled by your proposal are not terrorists. But even if all of them were aliens and alleged terrorists, by what authority may they be denied the liberty and due process of law guaranteed by the Fifth Amendment?

The solution is not to politicize the law of extradition still further, but to rewrite the political-crimes defense in due-process terms.

The "politically motivated crime in the course of an uprising" test should be replaced by one which focuses on the potential for injustice at the hands of the requesting regime and contains the same protections for political dissenters that exist under U.S. law.

The courts should administer the due process test, but the Secretary of State should be able to invoke it too whenever he believes an extradition would be unjust. In marginal cases, both the courts and the Secretary should be permitted to extract promises from foreign prosecutors as a condition for extradition.

And, where a just trial abroad is not possible but the crime is particularly heinous, trial within the United States according to international standards should be authorized.

That is how to deal with terrorists without destroying either liberty or justice.

CHRISTOPHER H. PYLE,
Associate Professor, Department of Politics,
Mount Holyoke College.

SOUTH HADLEY, MASS., *January 1, 1982.*

Ruining Extradition

(By Christopher H. Pyle)

South Hadley, Massachusetts.—For more than two centuries, the United States has provided a refuge to which opponents of authoritarian regimes could flee without fear that they would be returned to stand trial for political offenses. That policy may be about to end.

Under either of the extradition bills now cleared for debate in Congress, persons charged with political crimes would be stripped of their legal defense and United States courts would be turned into the long arms of foreign persecution.

The purpose of the bills—to facilitate the return of terrorists—is manifestly worthwhile. However, both bills are so badly written that they would endanger the very persons that American law governing extradition has always shielded: critics of foreign regimes, former freedom fighters against authoritarian rule, former officials of regimes that the United States once supported.

For example, both bills provide for the arrest of an accused person without any proof that he is guilty of a crime. A mere allegation by a foreign dictatorship, coupled with a promise to produce evidence sometime in the future, would be sufficient to cause the United States Government to jail the accused for months. No United States prosecutor has this power of arbitrary detention, but under these bills, Albania, Rumania, South Africa, El Salvador and about 90 more countries with which we have extradition agreements would have it, and could use it to bring about the imprisonment of their critics within the United States.

Under current law, no American court will allow a person to be extradited if it can be shown that he or she is really being sought for "an offense of a political character." Each bill would, in its own way, destroy this defense.

The Senate bill, which the Administration favors, would do so by stripping the courts of jurisdiction over the political crimes defense. Instead, the accused would have to raise his claim with the State Department, which could then decide whether protecting him from persecution is worth the risk of alienating the foreign government involved.

The State Department's motive for supporting this bill is clear. It wants to be able to swap alleged criminals with foreign countries the same way that children trade baseball cards: "We'll give you one terrorist if you give us three embezzlers."

The House bill seems more protective of political refugees than the Senate bill because it would keep in the courts the power to decide the political crimes defense. However, the appearance is deceptive, because the House bill would forbid the courts to regard as political, and hence not extraditable, any offense involving bodily violence or a conspiracy to commit body violence. There is a tiny exception for crimes committed under "extraordinary circumstances," but the bill does not say what they might be. All that is clear is the political message: Protecting foreign revolutionaries from return to authoritarian regimes should be a rare, not common occurrence.

As if to emphasize a preference for authoritarian regimes, both bills would forbid the courts to question whether a request for extradition was really a subterfuge for persecution. Nor would the courts be allowed to hear evidence that the charges against the accused resulted from torture or to deny extradition on the ground that the requesting regime is notorious for brutal interrogations, unjust trials or cruel punishment. Judgments of this sort would be left to the State Department, which currently pretends that El Salvador protests human rights.

The Administration claims that the courts should be denied the power to look into foreign injustice in order to assure the neutrality of the United States in foreign political conflicts. However, there can be do doubt where the Justice Department's sympathies would lie; both bills would require its lawyers to represent all foreign governments in their extradition requests. The United States would be neutral—on the side of whoever happens to be in power.

In anticipation of this legislation and a treaty to implement it, the Marcos dictatorship is requesting the extradition of more than a dozen of its opponents now living in the United States. One of those charged with plotting in the United States to support bombings in the Philippines is Benigno Aquino Jr., an associate at Harvard University's School of International Affairs who ran against President Ferdinand E. Marcos in the last free election. The only "evidence" against Mr. Aquino comes from the confession of an alleged coconspirator who later recanted, claiming he had been tortured. However, if either bill now before Congress passes, that evidence will be sufficient to send this democratic politician back into the hands of the dictator he opposed.

An Analysis of H.R. 5227 Prepared by Prof. Christopher H. Pyle

I appreciate this opportunity to comment on the Subcommittee's bill (H.R. 5227) to reform the extradition laws of the United States.

Comprehensive legislation to reform the law governing the international exchange of criminal suspects is more than a century overdue. During the 1850s and 1860s, when that law was in its infancy, the United States led the way. This leadership was lost, however, when Great Britain enacted its famous Extradition Act of 1870. Since then, the American law of extradition has been largely imitative of the policies and values of more authoritarian regimes. This is to be expected, of course, whenever the laws affecting individual rights to life, property, and due process of law are made by diplomats. The essence of diplomacy is not principle, but compromise, and when nearly all of the more than 100 nations with which we have extradition treaties are more authoritarian than we are, it is inevitable that those agreements will contain concessions to authoritarianism.

This is why I am pleased that a subcommittee of the House Committee on the Judiciary is attempting to draft comprehensive legislation. Any law affecting individual rights is too important to be left to diplomats. Unlike the State Department, the Judiciary Committee is under no obligation to pretend that the courts of Albania, Argentina, or even France are as fair and just as our own. The Judiciary Committee is in a position to confirm what the Founders of the Republic knew implicitly: that extradition is a matter of law, not diplomacy, and that no American official may ever be empowered to trade a human being to a foreign government for diplomatic advantage.

THE POTENTIAL FOR INJUSTICE

Thus, of course, is the chief defect of S. 1639 (and its more recent incarnation, S. 1940). Senator Thurmond's bill, introduced largely at the behest of the State Department, would strip the courts of jurisdiction to consider the political crimes defense to extradition, and would transfer administration of that defense solely to Secretary Haig and his successors. That, I have suggested in an earlier statement,[1] would constitute a return to the medieval practice, when political refugees were exchanged among princes as a matter of convenience.

Unfortunately, H.R. 5227 would seem to endorse this medieval practice. Section 3194 (e)(1)(A) provides that—

"Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State."

Implicit in this provisions is a backhanded suggestion that the courts may not consider such question. If that is so, I submit that the provision is not constitutional, because extradition is a matter of law, not politics, and hence must comply with the requirements of the due process clause of the Fifth Amendment. Due process requires that the courts not be complicit in the injustices of the foreign legal systems that they assist. The fact that American courts have failed to live up to this obligation by following a "rule of non-inquiry" into the potential for injustice awaiting the extraditee is no reason for the Judiciary Committee now to codify that diplomatic blindness. The obligation should be made explicit, or the entire provision dropped.

Implicit in the provision is the implication (I hope not intended) that rescuing extraditees for foreign persecution is a mere discretionary duty of the Secretary of State. All other things being equal, the bill seems to say, the Secretary may act justly, if he feels like it. Similarly, sub-section (B) of that provision permits him to deny extradition on humanitarian grounds, again, only if he feels that it is politically prudent to do so.

Over the years, the State Department has been very hesitant to impunge the integrity of foreign tribunals. 1 Moore, Extradition, sec. 376. For example, when Nazi Germany sought to extradite a Jew in 1934, the Legal Advisor to the State Department took the position that the United States would not be justified in refusing to surrender the fugitive merely because of an allegation that he might not receive a fair trial. 4 Hackworth, Digest, sec. 339 at 202, sec. 342 at 215–16 (1934); 2 Dep't of State Legal Advisor Ops. 2117.

Opinions like this suggest that there is little reason to leave anything to the unguided discretion of the Secretary of State. Both sub-sections should be rewritten to

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[1] Extradition and Political Crimes. Statement for the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, November 17, 1981.

require the Secretary to deny extradition whenever there is probable cause to believe that persecution or inhumane consequences would result from the delivery of a suspect. This affirmative obligation should supplement, not supplant, a comparable duty on the judiciary. Like the judiciary, the Secretary of State has a constitutional obligation not to be complicit in the injustices of foreign legal systems.

THE POLITICAL MOTIVES IN AN UPRISING TEST

The Subcommittee is correct, I believe, in abolishing the doctrine that any criminal can escape extradition if he can prove that he did his deed with political motives in the course of an uprising. *In re Castioni*, [1891] 1 Q.B. 149, *In re Ezeta*, 62 Fed. 972 (N.D. Cal. 1894). Good motive alone is not a defense to an indictment in American law; it should not be a defense to an extradition under American treaties or statutes.

The "political motives in an uprising" test has produced some shocking decisions from U.S. courts. One denied extradition to Yugoslavia of a former official of the Croatian government accused of the extermination of 1,293 named individuals and some 30,000 others, identities unknown, during World War II. *Artukovic* v. *Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), aff'm, sub nom. *Karadzole* v. *Artukovic*, 247 F. 2d 198 (9th Cir. 1957), vacated and remand on other grounds, 355 U.S. 393 (1958), surrender denied on remand sub nom. *United States* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). Others have treated the terroristic activities of the Irish Republican Army as politically motivated crimes committed in the course of an uprising, which they are, with the result that the United States is becoming a refuge for IRA bombers. *In re McMullen*, No. 3-78-1099MG (N.D. Cal., May 11, 1979). See also the case of Desmond Mackin, referred to in the New York Times, Dec. 29, 1981, p. A14.

There is good reason to extradite such people, provided they can receive a fair trial and punishment abroad. If they cannot be assured fair treatment abroad, they ought to be tried for genocide or terroristic crimes here. Any system of law that gives safe haven to persons who engage in mass, indiscriminate killing is a perversion of the original, humanitarian purposes of the political crimes exception. The problem is how to achieve this end without further politicizing the law of extradition.

The solution I propose is to let the courts consider the potential for injustice to the accused and to deny extradition, when necessary, even to save a war criminal from injustice. However, in the case of war criminals and other terrorists, I would provide for trial in the United States under international standards of justice. Despite the strong territorial basis of our legal system, this is constitutionally possible.

I do not mean to suggest that I believe that all political activists who kill should be returned. The political crimes defense was devised by liberal asylum countries like Belgium, France, and the United States precisely so that liberal revolutionaries like Kossuth, Mazzini, and Garibaldi would not have to be surrendered like ordinary criminals to the police states of central Europe for the sort of crimes that the American revolutionaries committed against the law of Great Britain in the course of their war for independence.

I would hope that the United States would always refuse to extradite such revolutionaries. The problem is how to protect them and punish the modern purveyors of political terror—the hijackers, kidnappers, machinegunners, and bombers—who kill people at random, in patent disregard for the lives of innocent persons, and who even use these killings to generate terror within the civilian populace in order to extort money and political benefits.

One answer, it seems to me, is to command the courts to look into the capacity of the demanding state to do justice. This permits the courts to protect liberal refugees from demonstrably tyrannical regimes while returning demonstrably tyrannical revolutionaries to the courts of liberal regimes. In most instances, a regime worth revolting against will engage in systematic political injustice, whereas a regime worth assisting will be able to do justice even to those who would destroy the liberty it provides. In marginal cases, where a liberal regime worth assisting does not guarantee justice, conditional extradition or executive denial of extradition may be used.

My solution has the added advantage of permitting the Secretary of State to tell an authoritarian regime that he would like to be helpful in its struggle against internal subversion, but the decision to extradite is not for him to make. Like other politicians, he would be able to blame the courts for doing what he does not dare admit is right.

Of course, my solution will not be popular with those radicals who support terrorism for the sake of social justice. There are many regimes on this earth that richly deserve to be overthrown, but anyone who seeks to overthrow them by the use of

random terror probably is not worth protecting from extradition. Morally he is indistinguishable from those he would depose and is thus unlikely to produce a sufficiently better system of rule to justify the carnage.

H.R. 5227, however, would not favor liberal revolutionaries any more than it would favor authoritarians or radicals. It is a flat-out antirevolution bill. Under Section 3194(e)(2)(A)(v), anyone who commits homocide or assault with the intent to commit serious bodily injury would "normally" be denied the benefit of the political crimes defense. By this standard, courts would feel compelled to order the return of:

The assassins of a brutal dictator like Adolph Hitler, Idi Amin, or the Ayatollah Khomeini;

Victims of torture who assault their tormentors in the course of escaping;

A latter day George Washington and his troops;

A Les Walesa charged with resisting arrest;

Most of the CIA's client coup-makers and counter-revolutionaries.

Stripped of judicial protection, these people would be at the mercy of the current administration and the transient exigencies of American foreign policy.

H.R. 5227 accepts the myth that there is a "family" of nations so advanced in its standards of justice that the moral right of revolution can now be forgotten. It forget the purpose for which our Revolution was fought and breaks faith with the principles enuniciated in our Declaration of Independence. When governments become destructive of the ends for which our Republic was founded and believers in those ends fight to abolish those governments by means which are not terroristic, then the United States should be prepared to grant them refuge and deny all demands for their extradition. That determination should be built into our law of extradition and not left, as H.R. 5227 would leave it, to the whim of the Secretary of State.

The approach I advocate also solves the problem of victors' justice. Extradition treaties survive coups and revolutions. Thus, there is always the danger that the new regime will seek the extradition of former officials of the ancien regime, often for seemingly "ordinary" crimes like the embezzlement of state funds. E.g. *In re Ezeta*, 62 Fed. 92 (N.D. Cal. 1894). This was the case when the new regime in Iran sought return of the Shah. Fortunately, the absence of a treaty of extradition meant that no one in the United States had the authority to order his return. However, had a treaty existed and H.R. 5227 been in force, the decision would have been left entirely to the Secretary of State (and the President). With no legal impediment to surrendering the Shah, Secretary Vance would have had to decide whether to defend to process and humanitarian values and thereby risk the lives of 50 Americans held hostage in Iran, or to send one human being to certain death at the hands of a kangaroo court into order to negotiate the release of 50 others. No Secretary of State should be faced with such a dilemma. Yet that is precisely what H.R. 5227 would do. In an effort to make life more difficult for terrorists, it would actually make it easier.

Under my proposal, extradition of the Shah would be denied by the courts, not because the United States vouches for his moral character or politics, but because the courts refuse to be complicit in the obvious injustice of Iranian courts. The Secretary of State could continue his negotiations free from any temptation to trade in human flesh, and the focus of attention would be back where it belongs, on the terrorism of the hostage takers.[2]

THE POTENTIAL FOR INJUSTICE TEST

Under the "potential for injustice" test which I have proposed,[3] Amercian extradition courts would look for more than a politically motivated prosecution or a political climate that makes a fair trial unlikely. They would also consider the likelihood that he will be subjected to methods of interrogation, incareration, prosecution, adjudication, or punishment that do not meet minimal standards of justice and decency.

I realize that their are some people who find this proposal both novel and "unrealistic." It would not have been so regarded by the Founders, or the best legal minds of their generation. Voltaire, Jefferson, Beccaria, and Bentham all agreed, as Bec-

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[2] Another way to achieve this end is to define those politically motivated crimes committed in the course of an uprising that are two morally repugnant to be entitled to protection under the political crimes defense. H.R. 5227 does this with genocide (Sec. 3194); it could also exempt crimes of random violence, conducted as part of a program calculated to terrorize a population or to export political or economic benefits. A similar provision could exempt brutal dictators and their henchmen from the benefits of the political crimes exception.

[3] Statement, *supra*, note 1.

caria put it, that no international laws of extradition should be adopted "until laws more in conformity with the needs of humanity, until milder penalties, and until the emancipation of law from the caprice of mere opinion, shall have given security to oppressed innocence and hated virtue. . . . "Crimes and Punishment" (1764) (Farrer trans. 1880), 193-4.

Frankly, I do not see what is novel or unrealistic about recognizing that torture, prosecutorial misconduct, partisan adjudication, and cruel and unusual punishment exist in the legal systems of some of the countries with which we exchange criminal; suspects. It is unrealistic to pretend that they do not.

There is only one explanation for this lack of realism, and that is the belief that the practical advantages of a system of extradition outweigh whatever individual injustices may occur. Within this calculus, relatively little weight is given to the danger of injustice because of an unstated assumption that most of the potential victims are probably guilty of something and, besides, are aliens.

Indeed, I submit that the law of extradition does not evince greater sensitivity to considerations of justice and humanity precisely because aliens are widely regarded, both here and abroad, as a sub-species of humanity, not entitled to the same respect accorded to citizens of the State. Those who take this view, of course, have abandoned the humanism of the 18th century America for the statism of 19th century Europe. They no longer believe, as the Founders did, that there are some fundamental rights which are antecedent to the origins of government, or derive from a higher law. Rather, they agree with Hegel and most modern diplomats that service to ones "own particular fatherland [is] the criterion by which the ethical activity of all individuals is measured . . . . For there is no room in living reality for empty notions like that of pursuing goodness for its own sake." G.W.F. Hegel, "Lectures on the Philosophy of World History: Introduction" (1830 draft; Nisbet trans. 1975), 80.

There are two things wrong with this view of aliens, besides its obvious immorality. One is that it violates the 18th century Constitution under which we continue to live. The due process clause of the Fifth Amendment makes no distinctions regarding the nationality of the "persons" it protects. The other is that the idea that aliens are the only people who can be extradited is factually incorrect. Under American law citizens are as vulnerable to extradition as aliens.

DOUBLE STANDARDS OF JUSTICE

Because H.R. 5227 was drafted primarily with the extradition of aliens in mind, it promotes several double standards of justice not only between aliens and citizens, but between citizens charged by American prosecutors and citizens charged by foreign prosecutors.

Probable cause: The first double standard involves the amount of evidence necessary to arrest a person and hold him for trial. To arrest any person adn hold him for trial in the United States, the government must demonstrate that it has probable cause to believe that he committed the crime charged. Under Section 3192 (arrests) and Section 3194 (evidence needed to authorize extradition), a person could be arrested and bound over for trial in a foreign land on an evidentiary showing of much less than probable cause. Indeed, under Section 3194 (d)(B)(ii), treaty-makers would be permitted to set the standard of proof as low as they like. The provision would not only seem to violate the Fourth Amendment's standard for the seizure of persons; it would produce the anomalous results that American citizens, like aliens, would have less protection against the accusations of foreign prosecutors than American prosecutors.

Preventive detention and suspension of habeas corpus: No person can be arrested and held by American authorities for a crime against American law without a demonstration of probable cause in the time it takes to arraign him or for his lawyer to obtain a writ of habeas corpus. Under Section 3192 (d), however, an American citizen of alien could be arrested and held for up to 60 days without probable cause or the production of the necessary documents by the requesting government. This provision would seem to suspend the privilege of the writ of habeas corpus in a manner not authorized by the Constitution.

The government s right to appeal: Third, H.R. 5227 would permit the government to appeal extradition decisions that its foreign clients do not like (Sec. 3195). Again, a person charged by a foreign prosecutor would receive less protection than a person charged by an American prosecutor. If the Justice Department cannot appeal a grand jury's decision not to indict, it should not be able to appeal a court's decision not to authorize extradition.

The appeal of bail decisions: Similarly, the standards for granting bail to extraditees should be the same as the standards for granting bail to all other persons

awaiting trial. Although diplomatic considerations impel the government to seek preventive detention, these considerations are no more relevant to a bail decision than the concern of local politicians. If equal protection of the laws is to mean anything, extraditees should be governed by the same Bail Reform Act that governs other persons accused of crime.

THE LISTING OF POLITICAL CRIMES

As I suggested in my earlier statement, there is not need to list the so-called "pure political crimes" if the international law standard of double criminality is applied. Substituting the double criminality standard for the listing technique is beneficial from a law enforcement standpoint, because there may be provisions of some statutes labeled "treason" and "sedition" that our courts would find consistent with First Amendment requirements.[4] Instead of labeling, perhaps the statute could simply deny extradition under any criminal law that would not pass muster under the United States Constitution.

CONDITIONAL EXTRADITION

Under Section 3196, the power to attach conditions to extradition is expressly granted to the Secretary of State only. As I have suggested in my earlier statement, this is a power which should be vested in the courts too. Conditioning extradition to fulfill the requirements of due process is not a duty of the Secretary alone.

ADMINISTRATIVE PROCEEDINGS

Finally, whatever discretion the bill finally grants to the Secretary of State, he should be directed to treat extradition decisions as quasi-judicial in nature, requiring the promulgation of standards, the appointment of hearing officers, the holding of hearings with counsel present, and all other guarantee of procedural due process appropriate to the most solemn of decisions involving the liberty of persons.

I hope that the Subcommittee finds these comments helpful. I stand ready to be of assistance of any way that I can.

WRITTEN STATEMENT OF ABDEEN M. JABARA, ESQ.

Mr. Chairman, Members of the Committee, I am pleased to have this opportunity to testify in writing on the proposed "Extradition Act of 1981" (S. 1639) and to express serious and considered opposition to its passage as it is currently drafted.

My name is Abdeen M. Jabara, and I am a lawyer and senior partner with the Detroit, Michigan law firm of Jabara, Fadel, Harroun, Samaan and Mashni, where I have a civil rights practice. Since 1979 I have been chief counsel in the legal defense team of a major international case of extradition and, as such, have had an opportunity to observe and participate at first hand in the workings of United States extradition law and procedure. I am testifying today as a private citizen who is concerned that any revision of United States extradition law, such as that contemplated by S. 1639, incorporate our traditional respect for freedom, democratic institutions, constitutional safeguards, and promotion of human rights.

The proposed Extradition Act of 1981 would make major changes in current law and substantially effect legally enshrined principles of civil rights and human liberties. These changes would mean the elimination of protections which have developed over a period of history in which the development of the specific modalities of extradition law has enjoyed careful judicial, executive and legislative scrutiny.

I am particularly disturbed by the change which S. 1639 seeks to effect relative to the federal courts' jurisdiction in the determination as to what consitutes a non-extraditable "offense of a political character" under the terms of the more than seventy five bilateral extradition treaties to which the United States is a party. S. 1639 would radically alter a historic development of removing from the executive branch of government (the King in the monarchies of medieval times) and placing in the hands of an independent judiciary the development of judicially ascertainable, applicable and binding tests to determine whether or not a particular offense upon which extradition is sought is of a "political character" or not. By removing this question

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[4] The Subcommittee should also give some thought to the problem of espionage. Today it is listed in treaties as a crime for which extradition may never lie, but perhaps that flat prohibition should be modified to permit the extradition of persons whose spying against our allies affects our security adversely. This is a tricky problem, because we would not want to be put in the position of having to deliver the spies we target against our allies.

from the competency of federal court jurisdiction and placing it within the discretion of the Secretary of State, S. 1639 would unduly politicize the very determination of what is an "offense of a political character" and thereby deprive persons in the United States, U.S. citizens and non-nationals alike, of fundamental constitutional rights. Arguments are consistently made before this Committee (See Statement of William M. Hannay) and in several recent federal cases (*United States vs Mackin*, USCA, 2nd Circuit, Docket Nos. 81-1324, 81-3064; *Ziyad Abu Eain vs Peter Wilkes*, USCA, 7th Cir. No. 80-1487 (1981)) that the judiciary is not equipped to deal with such issues, that what is an offense of a political character requires expertise in matters of foreign conflicts and sensitivity to diplomatic considerations that the judiciary neither has nor can acquire. The Court of Appeals opinion in *Abu Eain, supra*, at p. 14, wrote, rejecting the argument of the Executive Branch that the question of political offense was solely one for the Executive, that:

"The government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue which, the government says, does not lend itself to judicial application. See L. Tribe, American Constitutional Law 75 (1978) (hereinafter referred to as 'Tribe'). Instead, the government emphasizes the constitutional commitment of foreign policy and international affairs decisions generally to the Executive, and suggests that the political nature of those areas renders them unsuitable for judicial consideration. But, as the Supreme Court has said, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence.' Baker v. Carr, 369 U.S. 186, 211 (1962)."

And further, at page 15:

"The government stresses the unique resources available to the Executive to aid its determination of the political situation in foreign lands. But the State Department can and has made it a practice to share that information with courts during extradition proceedings. In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not. The resources to make that initial determination can ordinarily be sufficiently produced for judicial consideration."

And then at p. 17-19:

"The government's concerns seem directed to whether the Judiciary will recognize a given sort of violence as falling within the protection of the political offense exception, thus implicitly conferring on certain actions a status with which the Executive might disagree. We point out that the Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable 'political question.' To some extent, 'all constitutional interpretations have political consequences,' R. Jackson, the Supreme Court in the American System 56 (1955), and indeed the same follows from any treaty interpretation. We recognize the need for special sensitivity in areas such as our government's foreign relations conduct, but that sensitivity does not preclude the Judiciary from having a part in the process of determining whether the political offense exception applies. That determination involves an approach to factfinding that is traditional to the courts.

"We also disagree with the government's argument that there are no judicially discoverable and manageable standards to guide the court's discretion. For better or worse, the extradition statute requires the magistrate to determine that the crime alleged is listed in the applicable treaty, and that the provision of the treaty relating to political offenses does or does not apply. Before an act may constitute a political offense, there must be two basic determinations made by the magistrate that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance. The magistrate's legal determination that a person is extraditable does not bind or control the Secretary's later political conclusion. In re Ezeta, 62 F. 972 (N.D. Cal. 1894). On the other hand, if the magistrate concludes that the individual is not extraditable, it is up to the Secretary to decide whether or not to pursue the issue before another magistrate, as in In re Gonzalez, 217 F. Supp. 717 (S.D. N.Y. 1963). The Secretary, it appears, contrary to general practice, has been permitted to shop for a more receptive magistrate.

"In order to assure that there is adequate protection of the rights of an individual whose extradition is requested, '(p)urely as a practical matter it would seem reasonable for the courts of this country to make an initial finding of extraditability of particular offenses.' *Shapiro* v. *Ferrandina*, 478 F2d 894, 906 (2d Cir.), cert, dismissed, 414 U.S. 884 (1973). As Judge Friendly stated in the *Shapiro* case,'we see

little reason why a prior judicial determination would be viewed by (the Secretary of State) an unwarranted intrusion upon executive power.' Ibid. See Sharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L.J. 517, 584 (1966) (courts are cautious about invoking political question doctrine where important individual rights are at stake)."

If anything, in order to advance the cause of individual rights, S. 1639 should be amended to (1) place solely within the jurisdiction of the Courts the determination of what is a non-extraditable "offense of a political character", (2) remove it from the discretionary powers of the Secretary of State, as is presently provided and, (3) lastly, prohibit the Secretary from "shopping" for a more understanding Magistrate when one rules that the offense charged is a non-extraditable offense of a political character, as the Secretary is presently doing in the *Mackin* case, supra.

Moreover, while the Courts can and should look to the State Department for expertise on the facts of a given foreign conflict, as was done in *Mackin*, with the testimony of Mr. Frank Perez, the testimony of the State Department on ultimate legal issues, as opposed to facts, can be highly prejudicial of individual rights and elemental due process of law. In *Abu Eain*, for instance, a representative of the State Department, Mr. Lewis Fields, Jr. was allowed to testify on the State Department's view as to an ultimate legal issue before the Court which was solely determinable by a judicially evolved test. One legal writer has concluded that the Field's testimony in *Abu Eain* influenced the Magistrate to posit a test which was *not* based on previous judicial precedent, thus depriving *Abu Eain* of the benefit of the traditional "political incidence" test. (See Terrorist Extradition and the Political Offense Exception: An Administrative Solution, Virginia Journal of International Law, Vol. 21, No. 1, Fall 1980 p. 175.)

With regard to the bail provision of the draft bill, this writer would urge the Committee to bring the standards for release on bail in line with the standards developed in criminal cases in the United States. Appeals can take years and under the current practices and S. 1639 retention of "special circumstances" standard an individual may be incarcerated for a protracted period even though they have not been charged with the commission of any offense against the laws of the United States. It would appear to be most unjust to subject persons whose extradition is requested to more stringent bail standards than exist for even persons charged with violations of the criminal laws of the United States, even those with felony records.

Lastly, to the extent that the Secretary of State will be provided with a role in the denying or granting of extradition, such a role must not have statutorily unfettered discretion. Subsection (a) of Section 3196 only limits the Secretary's discretion by the provisions of the chapter and the applicable treaty. Subsection (a)(1) simply permits the Secretary to order surrender of a person the Court has found to be extraditable or, under Subsection (a)(2) the Secretary may condition the surrender of a person upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice. The commentary on the provision contained in the Memorandum on Extradition Legislation published in the Congressional Record on September 18, 1981 states:

"This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns or questions concerning trial procedures in the requesting state exist."

The difficulty with this subsection is that (1) it does not impose any affirmative duties on the Secretary where a country with whom the U.S. has a bi-lateral treaty for extradition is a consistent and gross violator of internationally recognized human rights or where a claim that the individual's human rights would be violated were he to be extradited for trial, and (2) it does not establish any procedure of fact finding with regard to fair trial or human rights issues before the Secretary but merely allows the Secretary to make what might be diplomatically astute decisions but ones which are violative of the Constitutional prohibition of subjecting anyone to cruel and unusual punishment or a denial of due process of law. Therefore, where a claim is made by an individual to the Secretary that he or she would be denied a fair trial or that his or her fundamental human rights and liberties would be violated by the requesting state, that individual should be provided with access to all the information which the Secretary has available to him on these issues and should be allowed to make a fact presentation on these issues. This is all the more compelling where, as in the *Abu Eain* case, the respondant's attempts to introduce evidence on human rights issues such as methods used by the requesting state in the obtaining of in-custody inculpatory statements, and fair trial, were continuously rejected and discovery relative to the requesting state's evidence was continuously denied.

Again, I wish to extend my deep appreciation for this opportunity to appear before this Committee and offer this testimony for the record. It is my small hope

that these views will merit the attention of the members of the Committee before they act on a matter that so seriously affects how millions of people around the globe perceive our judicial system and form of government, so seriously effects human liberty and civil rights, and impacts upon our international relations.

STATEMENT OF PROF. CHRISTOPHER H. PYLE

The question I have been asked to address in this statement is whether it is possible to exempt "terrorists" from the political crimes defense to extradition without depriving worthy revolutionaries of the same protection.

There are two ways to approach this problem. One is to phrase the exemption in terms of the word "terrorism." The other is to enumerate certain heinous crimes or threats which should, for all purposes and at all times, be open to punishment. I shall examine each approach in turn.

DEFINING TERRORISM

Extradition is the process by which persons under the protection of the United States Constitution are turned over to foreign governments for criminal prosecution. Accordingly, the crimes for which extradition may lie must be defined as specifically as any crimes proscribed by the Federal Criminal Code. The duty to be precise in this draftsmanship is a requirement imposed by the due process clause of the Fifth Amendment and its "void for vagueness" doctrine. The first question to be considered, therefore, is whether the term "terrorism" can pass this test.

Etymologically, terrorism refers to those acts or threats of violence which are calculated to instill fear—indeed terror—in the minds of a target population. Strictly speaking, terror must be the primary object, not the incidential by-product, of the frightening acts or threats. That is why, when we think of terrorists, we think first of persons who attack or make threats against presumptively innocent or helpless persons, or who kidnap, bomb, or murder for symbolic reasons. Terrorism refers, in its most pejorative sense, to acts or threats of violence which are wanton, indiscriminate, and without any immediate, practical objective. It is, in the words of some 19th century anarchists, "propaganda by deed." In 20th century parlance, terrorism may be characterized as a form of "psychological warfare" against non-combatants carried out by such means as the mailing of postal bombs, the killing of innocent travelers at airports, or the bombing of civilian airliners while in flight.

Contrary to popular impressions, terrorism in this "pure" sense is relatively rare. Far more common are acts and threats of violence which are intended both to achieve an immediate, practical objective, and to sow terror in the minds of a particular population. Typical examples include kidnapping to extort concessions like the release of colleagues, or the bombing of army barracks. In these "mixed" motive situations, one man's terrorist is likely to be anothers "freedom fighter." Thus, Israelis today denounce West Bank Arabs who bomb marketplaces as terrorists, while they look upon the leaders of their own terroristic attacks on the British in 1948 as national heroes. Americans do the same when they look back fondly on the "Sons of Liberty" who fomented revolution in colonial Boston. From the British perspective, the Sons of Liberty terrorized loyal subjects by attacking ships, destroying cargoes, tarring and feathering Tories, and sniping at General Gage's troops.

1. Terrorism against establishments: The term "terrorism" is most commonly used by political and economic establishments to characterize hit-and-run attacks upon their power and authority. The extent to which the attackers are viewed as terrorists or freedom fighters often has less to do with the acutal tactics they use than with their political ideology, their political objectives (e.g. liberation from an occupying power), their political and military organizations, and the number of sympathizers they have within the observing populace. Such considerations are, of necessity, highly political and are not susceptible to neutral application by our courts. To the extent that extradition courts are required to take these considerations into account, as courts are under the current "uprising" test, legal decisions will be affected by ethnic and ideological politics.

There is another problem with taking our definition of terrorism from common usage, and that is that attacks upon the established order constitute only a small part of the terrorism rife in the world today. Far more terroristic violence is committed by political factions against political factions, and by government against their own citizens, or against foreign governments and their citizens.

2. Factional terrorism: If Congress wishes to combat terrorism and not just revolutionary violence, its policy must facilitate punishment of the sort vigilante terrorism practices by Protestant and Catholic extremists in Northern Ireland, by Nazi Brown

Shirts in Weimar Germany, and by modern death squads in Argentina, Guatemala, and El Salvador. Exempting these terrorists from the political crimes defense is not the answer. Requests for their return will be rarely made, because much of their terrorism is carried out with the tacit approval of established authorities. Prosecution in the United States, or before international tribunals, would be a more appropriate solution, although not without jurisdictional difficulties.

3. Establishment terrorism: The greatest terrorists of all, of course, operate from established positions of power. Obvious examples include Robespierre's Jacobins, the Tsars' secret police, Stalin's secret police, Hitler's Gestapo, Haiti's tonton macoute, South Africa's secret police, Khomeni's revolutionary courts, Chile's DINA, and Latin America's military and civilian death squads.

Nor is all governmental terrorism internal; some is made for export, including the U.S. sponsored secret war against Cuba, the U.S. sponsored Phoenix Program in Vietnam, and the CIA's plots to assassinate Fidel Castro and Patrice Lumumba.

It is discomforting to think of these CIA operations as terroristic, but they were in effect, if not in purpose. We cannot condemn Libya assassins as terrorists unless we are willing to accept the same characterization for our own hired killers. Similarly, if we are going to deprive IRA gun runners of the political crimes defense to extradition, we cannot give the same defense to CIA operatives who supply guns to coupmakers in the Dominican Republic. Nor can we condemn Chile for refusing to extradite the DINA officials who plotted the murder of Orlando Letalier in Washington, D.C., unless we are willing to extradite the CIA operatives who supplied guns to the group that killed General Schneider.

The double standard of morality evident in these comparisons only confirm what must be obvious: the term "terrorism" is too imprecise, too freighted with political judgments, and too open to misunderstanding to be a useful category in the American law of extradition.

THE HEINOUS CRIMES APPROACH

Even so, there is something in us all that says that there are certain crimes, such as the killing of children and spouses, the murder of athletes, the machinegunning of travelers, the sabotaging of commercial airliners, the mailing of postal bombs, and the bombing of marketplaces, that are so wanton, so indiscriminate, so callous, so disproportionate, and so remote from any practical objective as to warrant universal condemnation. Accordingly, if the word terrorism will not do, we must ask whether the same humanitarian end cannot be achieved by enumerating certain heinous crimes for which political motivation will not constitute a valid defense to extradition.

The practice of making exceptions to the political crimes defense is almost as old as the defense itself. I will review those exceptions which have made their way into the law of extradition and then examine other possible formulations.

1. Assassinations: The first exception to the political crimes defense was the Belgium attentat clause directed against persons charged with attempting to assassinate the head of a foreign government or a member of his family. The clause was devised in the 1840's following an attempt by socialists to blow up a train carrying the Emperior Napoleon III through Belgium, and it became a standard provision of most extradition treaties as the result of a series of political assassinations during the late 19th century. The United States was first hesitant to adopt the clause, but acceded after the assassination of President Garfield. Great Britian never adopted it, *per se,* because the assassination of her monarch is legally defined as treason, one of the so-called pure political crimes for which most nations refuse to order extradition.

In 1974, the principle of the attentat clause was extended to attacks on, or threats against, diplomats by a multilateral convention to which the United States is a party. U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents. U.N. Doc. A/RES/3166, XXVIII (Dec. 14, 1974).

2. Anarchists: A second, judge-made exception denies the political crimes defense to anarchists. It was developed in the late 19th century following a wave of assassinations, bombings, and sabotage that included destruction of the French Chamber of Deputies. France sought the return of an anarchist named Meunier from Great Britain on charges of bombing a military barracks and cafe, and Great Britain complied. Meunier was not entitled to the political crimes defense, the British court ruled, because "the party with whom the accused is identified • • • namely the party of anarchy, is te enemy of all governments." *In re Meunier* [1894], 2 Q.B. 415, 419. The judges apparently agreed with the philospher Thomas Hobbes who argued

that even the worst government is better than none at all. In 1920, after President McKinley was assassinated by an anarchist named Czolgosz, the United States signed a Pan American Convention which expressly provided that acts pertaining to anarchism shall not be considered political offenses. Harvard Research on International Extradition (1935), 29 Am. J. Int'l Law, App. III, No. 3, 278. However, subsequent treaties do not include this provision, and there are no reported American cases which expressly deny the political crimes defense anarchists.

The movement to deny protection to anarchists can be seen as a humanitarian response to terrorism, and hence consistence with the original purpose of the political crimes defense. See, *e.g.* Jensen, "The International Anti-Anarchist Conference of 1898 and the Origins of Interpol," 16 J. Contemp. Hist. 323 (1981). Indeed, the term "anarchism" was most widely used then as a synonym for what we today call terrorism, without reference to the different ideologies of the groups that employed those tactics. Not surprisingly, as the original anarchists died out and the ideologies (communism, socialism, and facism) of those who used terroristic tactics became more widely accepted in Europe, this exception to the political crimes defense lost its appeal.

3. Crimes against war victims: The third major exception to the political crimes defense adopted by many nations involves criminal violence by soldiers against noncombatants. Here, as with assassinations and anarchistic bombings, considerations of humanity argue against allowing the accused to escape.

The United States have never ratified the U.N. Convention against genocide, but it is a party to the 1949 Geneva Conventions for the protection of war victims and their 1977 Protocols. The third article in each of the four Conventions imposes upon the United States an obligation to extradite or punish all fugitive soldiers charged with offenses against persons who are *hors de combat* (civilians, prisoners of war, the wounded and sick). These offenses include violence to life and person (particularly murder of all kinds, mutilation, cruel treatment, and torture), the taking of hostages, outrages against personal dignity (especially humiliating and degrading treatment), and the passing of sentences and the carrying out of executions without judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples. 6 U.S.T. 3116, 3118, 3220, 3222, 3318, 3320, 3518, 3520 (1955). The 1977 Protocols further forbid medical or scientific experiments, the removal of tissues and organs for transplantation, corporeal punishment, indiscriminate attacks upon non-military objectives, the starvation of civilians, and collective punishments. 72 A.J. Int'l L. 457–509 (1978).

Ironically, non-soldiers who commit these same offenses in the name of revolution, political extortion, covert action, internal security, law enforcement, or factional terrorism remain free to hide behind the political crimes defense. Accordingly, Professor Alfred P. Rubin of the Naval War College and the International Law Association's Committee in International Terrorism, of which Professor Rubin is a member, have proposed that this anomaly be eliminated by applying the Geneva standards to non-soldiers as well. See Rubin, "Terrorism, 'Grave Breaches,' and the 1977 Protocols," Proceedings of the 74th Annual Meeting of the American Society of International Law, April 17–19, 1980, 192–96, Rubin, "Extradition of Terrorists," International Practitioners Handbook, June 1981, 10–11, and Draft Report of the Committee on International Terrorism, International Law Association, 14 December 1981.

4. Hostage-taking: A fourth major exception to the political crimes defense involves the taking of hostages. It appears not only in the Geneva Conventions, but also in the U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, the proposed U.N. Draft Convention Against the Taking of Hostages, U.N. General Assembly, 33rd Sess., Supp. No. 39 (1978), and the OAS Convention against Persons and Related Extortions that are of International Significance, O.A.S. Doc. AG/88, 64 Dept. of State Bull. 231 (1971). The United States is also a party to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1640–1649 (1971), which contains an obligation to extradite or punish the hijackers of commercial airliners. An executive agreement promising to return airplane hijackers without the benefit of formal extradition proceedings was also signed with Cuba in 1973. 24 U.S.T. 737–749 (1973).

5. Sabotage of Aircraft: Fifth, the United States is a party to the Montreal Multilateral Convention for the Supression of Unlawful Acts Against the Safety of Civil Aviation. Thus our government has already agreed to extradite or punish persons who commit acts of personal violence on board commercial aircraft while in flight or who sabotage aircraft, navigation facilities, or communications in a manner likely to endanger the safety of aircraft in flight. 24 U.S.T. 565–575 (1973).

6. Torture: Sixth, efforts are currently being made to add torture to the list of heinous crimes against international law, and for which extradition or punishment would be an obigation of all nations of refuge. See, "Draft Convention on the Prevention and Supression of Torture," U.N. Doc. E/CN. 4/NGO 213 (Feb. 1, 1938), currently pending before the United Nations.

7. Destruction of property: Seventh, efforts to combat terrorism have led to conventions that would create an extradite or punish obligation for certain types of property destruction. One of the earliest was the League of Nations Draft Convention for the Prevention and Punishment of Terrorism, reproduced in Hudson, ed., International Legislation 862–867 (1935–1937). That agreement, which never went into effect, would have committed signatories to extradite or punish all persons who, with a terroristic intent, engage in the "willful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party."

H.R. 5227 AND THE HEINOUS CRIMES APPROACH

H.R. 5227 follows the heinous crimes approach. Rather than deny the political crimes defense to all persons charged with terroristic offenses, Section 3193(e)(2)(B) declares that "A political offense normally does not include" certain listed offenses. Two lists follow. The first reiterates those treaties under which the United States has promised to extradite persons without reference to the traditional political crimes defense (the conventions to protect internationally protected persons, suppress aircraft hijacking, suppress unlawful acts against the safety of aircraft, and by implication, the Geneva Conventions). The second list enumerates certain additional crimes which the draftsmen believe are too heinous ever to be redeemed, even by the best political motives.

Unfortunately, each of the categories enumerated in H.R. 5227 is overinclusive. Enforced literally, each could require American courts to authorize the extradition of persons traditionally entitled to the political crimes defense. For example, denying the defense to all persons who attack internationally protected persons could mean authorizing the extradition of a highly moral person for attempting to kill a brutal dictator like Adolph Hitler or Idi Amin in order to impede mass slaughter. Treating all airplane hijackers alike could put our courts in the embarrassing position of authorizing the return of freedom-seeking persons who, in desperation, hijack an airplane in order to flee a police state with closed borders.

Sub-section (v) of Section 3193 (e)(2)(B) is the most disturbing provision of all. It provides that the political crimes defense should not nomally be accorded to anyone accused by a foreign government of "homocide, assault with intent to commit serious bodily injury, * * * kidnapping, the taking of a hostage, or serious unlawful detention." Applied literally, this provision would destroy the political crimes defense. Had it been adopted in the 1840s, when the United States joined the international extradition movement, our courts would have been obliged to return many of the liberal revolutionaries who fought to establish parliamentary democracies in Germany, Italy, and Austria-Hungary. Our courts would have served as the long arm of the secret police of Tsarist Russia, Nazi Germany, and the Soviet Union, and they would have authorized return of persons charged with taking hostages or killing guards in order to escape gas chambers and torture. See, for example, *Re Federenko*, [1910] 20 Man. R. 22, 17 C. C. C. 268.

The offenses enumerated in H.R. 5227 make it appear that the Subcommittee is interested only in combatting terrorists who attack established authorities. To get at the majority of terrorists today, the Subcommittee would have to take Professor Rubin's advice and list the kinds of offenses enumerated in the Geneva Conventions and their Protocols—offenses by the powerful against the helpless.

However, H.R. 5227 will not advance the cause of justice if it merely exempts crimes like torture, mutilation, and genocide from the political crimes defense, because foreign prosecutions for these offenses will usually constitute a form of "victors' justice." See, for example, *Artukovic* v. *Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956). If we are to bring official terrorists to justice without being a party to foreign repriasals, we must be willing to punish them through our own courts, or through international tribunals.

Listing exceptions to the political crimes defense will work best if it concentrates on crimes which involve unjustifiable carnage, or injure innocent and helpless persons wantonly, indiscriminately, or with reckless disregard for their welfare. Thus, in addition to the listing the kinds of offenses enumerated in the Geneva Conventions and their Protocols, the bill might extend the principles of the Montreal and

Hague Conventions to other forms of public transportation and accommodation, including trains, subways, buses, department stores, markets, and waiting rooms.

However, there are two drawbacks to this kind of enumeration. First, it can never be comprehensive. Second, there may be times when attacks on various forms of public transportation and accommodation are militarily justifiable, despite the loss of innocent lives. If Germany can justify unrestricted submarine warfare against liners and the United States can justify fire-bombing Dresden, then certainly a revolutionary group can justify the bombing of vehicles or storehouses that could be of military advantage to the government, even if innocent lives are certain to be lost in the process.

Still another alternative is to abandon or supplement the use of lists with some version of the Swiss preponderance test. Under this test, the courts would have discretion to deny the political crimes defense to persons accused of crimes which seem so wanton, indiscriminate, reckless, cruel, and impractical as to merit universal condemnation. Unfortunately, when this approach is used courts quickly sink into the swamp of political and motivational analysis. Acts which seem senseless when viewed in isolation may have utility when seen as part of a larger campaign. This, at least, is the rationale of the "propaganda by deed" practiced by revolutionaries and the "psychological warfare" practiced by counter-revolutionary forces.

THE DUE PROCESS ALTERNATIVE

The trouble with all of these solutions is that they force our courts to second-guess the morality and utility of measures used in the course of foreign political strife. After struggling for centuries to depoliticize our criminal law, we persist in directing our courts to take political motivation into account when hearing extradition requests. As the State and Justice Departments have agued, this does not make sense.

Unfortunately, the solution they offer would politicize the law of extradition still further by reviving the medieval practice of exchanging political refugees for reasons of state. In my opinion, the Administration's approach is wrong for the same reason that the Subcommittee's approach is inadequate. Both start with, and react to, the same false premise of the European law of extradition—that courts must consider the political motivation of the accused.

There is another way to solve this problem, and that is return to the original premise of the American law of extradition—that no person should be extradited in response to a politically motivated request, or to a corrupt or unjust legal system.

The philosophical difference between the European and American premises is not difficult to understand. The American philosophy assumes that the ultimate end of all governmental activity is to promote individual liberty and justice; the European approach assumes that the liberty and justice of individuals may be subordinated to the larger interests of the State.

If the Subcommittee wishes to remain in the American tradition, it should reject the raison d'etat of diplomates and other statists, and adopt a due process approach which focuses on the capacity of the requesting government to provide apolitical justice. How this might be done is outlined in a statement entitled "Extradition and Political Crimes," which I submitted to the Subcommittee on November 17, 1981.

By shifting the focus from the political motives of the accused to the capacity of the requesting government to do justice, the Subcommittee would save our courts from appearing to take sides in foreign revolutions. Presumably this is what the Administration wants. Second, the Subcommittee would relieve the Administration from having to take sides in foreign disputes by allowing it to say to the requesting government: You could have had that fugitive but for your failure to provide a just legal order. Third, the Subcommittee would preserve the orignial, humanitarian purpose of the American law of extradition, which was not to do business with unjust regimes.

Of course, there are some crude alternatives to the due process approach. One is to require the Administration to "certify" that a foreign legal system is sufficiently just to receive the prisioner. Anyone who subscribes to this approach is undoubtedly gullible enough to believe the current Administration when it claims that the government of El Salvador is making progress in curbing violations of human rights. Certification is un-American and the European political motives defense to extradition, because it puts every man's liberty in the hands of executive officials.

Second, some procedure could be devised to abrogate or suspend extradition treaties when foreign legal systems become manifestly unjust through revolution, coups, or corruption. The problem with this procedure, like that of certification, is that it still puts the liberty of individuals under the control of executive officials. For obvi-

ous reasons of state, our diplomats are rarely eager to label foreign governments unjust, particularly when military and economic advantages hang in the balance.

In short, both of these alternatives are unacceptable because they propose to cure the disease of politicized law with Band-Aids.

THE CONSTITUTIONAL LAW OF EXTRADITION

A major reason why the American law of extradition has been infected with political considerations is that most American commentators on the subject are international lawyers, not constitutional scholars. Raison d'etat, not individual liberty, is the dominant value of their legal world. Accordingly, when they insist that the law of extradition is to be found in international practice, and only in international practice, they are imbuing the American legal order with executive-centered values common to regimes far more authoritarian than our own.

But, as Great Britain has demonstrated, the law of extradition need not come primarily from treaties. Nor need it be developed, as the American law has developed, by blind imitation of bad British decisions and worse European practices. It can start, as all law affecting individual liberty should start, from the jurisprudence of our Bill of Rights.

Of course, it may be argued that a domestic-oriented subcommittee of the House of Representatives should defer to the internationally-oriented policies of the President and the Senate because treaties are supposed to be of "equal dignity" with legislation. That is a false premise which results from a misreading of *Chae Chan Ping* v. *United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889). That case upheld the power of Congress to pass legislation abrogating the obligations of a treaty. It did not hold that subsequent treaties can overrule prior federal legislation. Federal treaties may override prior state laws regarding migratory birds, *United States* v. *Holland,* 252 U.S. 416 (1920). Executive agreements with foreign countries may override state-defined economic rights. *United States* v. *Belmont,* 301 U.S. 321 (1937), *United States* v. *Pink,* 315 U.S. 202 (1942), and *Dames & Moore* v. *Regan,* ——— U.S. ———, 501 S. Ct. 2972 (1981). However, the Supreme Court has never ruled that the President and two-thirds of the Senate may override a provision of the Federal Criminal Code enacted by majorities of both Houses of Congress and signed by a prior President. Both democratic theory and the primacy which the Founders placed on individual liberty argue conclusively against this interpretation.

In this instance, Congress need not expressly override the extradition treaties and throw the State Department into a frenzy of renegotiation. Congress need only enact a statute which proclaims a due process interpretation of the undefined political crimes defense to extradition, and mandates that all future treaties contain such a provision. This directive would not violate the President's powers for two reasons. First, he would have the opportunity to sign the bill into law, thereby adopting Congress's definition as his own. Second, if he were to veto the bill, two-thirds of the House and Senate could override his veto because the power to make treaties, like "all other powers vested by this Constitution in the Government of the United States, or in any * * * Officer thereof," is subject to the law-making powers of Congress. So says the oft forgotten "all other powers" provision of the Necessary and Proper Clause in Article I, Section 8 of the Constitution.

Nor should the House defer to the Senate because of the old saw that extradition treaties are "self-executing." Self-executing or not, legislation can overrride them. *Chae Chan Ping* v. *United States,* 130 U.S. at 600 (1889). Moreover, it may be incorrect to view extradition treaties as self-executing, for if they are, then the President and two-thirds of the Senate can, in effect, define the jurisdiction of the lower federal courts. This is not what Article III of the Constitution provides. Section 2 of that Article says that "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; * * *." The task of choosing which courts will exercise this judicial power is, according to Sections 1 and 2, assigned to *Congress,* and not to the President and the Senate.

In several recent treaties, including one now pending before the Senate, the State Department has assumed that the President may, with the advice and consent of the Senate, strip the courts of jurisdiction to consider the political crimes defense to extradition. That is a dubious claim. Extradition requests are "Cases" which arise under the Constitution and laws of the United States, because the Fifth Amendment provides that "No person shall be * * * deprived of life [or] liberty * * * without due process of law," and the writ of habeas corpus exists to enforce that right. Thus, when Great Britain sought extradition of Thomas Nash, alias Jonathan Robbins, under the Jay Treaty, both President Adams and his Republican critics agreed with

the judge that the question of who is extraditable was for the courts, and not for the executive, to decide. 10 "Annals of Congress" 515–619 (1801) and *Case of Nash,* Wharton's State Trials 392–457 (1799).

The same understanding continued to prevail in the 1840s, when the United States joined the international extradition movement. In 1846, the Supreme Court ruled that the question of who was extraditable under the 1843 treaty with France was for the courts to decide, even though the treaty was silent on the question and no jurisdictional legislation implementing the treaty had been passed by Congress. *In re Metzger,* 46 U.S. (5 How.) 176, 188–189 (1847).

In 1848, Congress passed its first legislation clearly vesting decision-making in extradition cases in the courts. 9 Stat. 302. Four years later, a plurality of the Supreme Court confirmed the appropriateness of this allocation. Attributing President Adam's defeat in the election of 1800 to Republican criticism of his intervention in the Robbins case of 1799, Justice Catron observed that "Public opinion had settled down to a firm resolve, long before the treaty of 1842 [with Great Britain] was made, that * * * an extradition without an unbiased hearing before an independent judiciary [was] highly dangerous to liberty, and ought never to be allowed. Congress obviously proceeded on this public opinion, when the act of 1848 was passed, and therefore referred foreign powers to the judiciary when seeking to obtain the warrant, and secure the commitment of the fugitive; and which judicial proceeding was intended to be independent of executive control, and in advance of executive action on the case." *In re Kaine,* 55 U.S. (14 How.) 103, 113 (1852).

Thus, even if one denies that the Constitution vests extradition decisions in the judiciary, it is possible to conclude that extradition treaties are self-executing only to the degree that the act of 1848 and similar statutes allow them to be. The Act of 1848 was passed specifically to guarantee that the courts would decide who was extraditable and who was not. It was also passed with the understanding that there would be a political crimes defense to extradition and that this defense would be administered by the courts. Inclusion of that requirement in legislation was rendered unnecessary by executive practice which remained unbroken until 1978 when the Carter Administration began negotiating treaties which purport to strip the courts of jurisdiction to consider the political crimes defense.

In short, Congress has the authority to reform the law of extradition by legislation, to reclaim its original understanding, to bring that law back into line with constitutional requirements, and to make it once again an instrument of liberty and justice.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 424,335,290—August Term 1981

(Argued October 30, 1981 Decided December 23, 1981)

Docket Nos. 81-1324, 81-3064 and 81-3070

In the Matter of the Requested Extradition of Desmond Mackin by the Government of the United Kingdom of Great Britain and Northern Ireland

UNITED STATES OF AMERICA,

Petitioner-Appellant

—against—

DESMOND MACKIN,

Respondent-Appellee.

DESMOND MACKIN,

Petitioner,

—against—

GEORGE V. GRANT, United States Marshal for the Southern District of New York,

Respondent.

Before

FEINBERG, Chief Judge, FRIENDLY and PIERCE, *Circuit Judges.**

Appeal by the United States from the decision of a magistrate appointed by the District Court for the Southern District of New York and alternative petition for mandamus relating to such decision. The decision denied a request by the Government of the United Kingdom of Great Britain and Northern Ireland for the extradition of a member of the Provisional Irish Republican Army on the ground that the offense for which extradition was sought was of a political character within the pertinent exception in the applicable extradition treaty. Petition for *habeas corpus* by the extraditee and motion for immediate release. Appeal of the United States dismissed for want of jurisdiction; alternative petition for mandamus denied in part and dismissed in part. Extraditee's petition for *habeas corpus* and attendant motion dismissed for want of jurisdiction.

THOMAS H. BELOTE, Special Assistant United States Attorney (John S. Martin, Jr., United States Attorney for the Southern District of New York, Mark F. Pomerantz and Robert S. Litt, Assistant United States Attorneys, Of Counsel), for Petitioner-Appellant, the United States of America.

KEARA M. O'DEMPSEY, ESQ. (Beldock Levine & Hoffman, New York, N.Y., and Frank Durkan, Esq., O'Dwyer & Bernstien, New York, N.Y., James Gilroy, Esq.; James P. Cullen, Esq., Sheila Donohue, Esq., The Brehon Law Society; Of Counsel), for Respondent-Appellee, Desmond Mackin.

* When this appeal was heard, Judge Pierce was a District Judge for the Southern District of New York, sitting by designation. He was inducted as a judge of this court on November 30, 1981.

FRIENDLY, *Circuit Judge:*

This appeal by the United States and an alternative request by it for mandamus consolidated therewith[1] relate to a decision of United States Magistrate Naomi Reice Buchwald (the Magistrate) of the District Court for the Southern District of New York dated August 13, 1981. The decision denied a request by the Government of the United Kingdom of Great Britain and Northern Ireland for the extradition of Desmond Mackin pursuant to Article VIII of the Extradition Treaty (sometimes hereafter the Extradition Treaty or the Treaty) between the United States and the United Kingdom. The Treaty, which is the successor to the very limited provision in Article 27 of Jay's Treaty, 8 Stat. 116, 129 (1794), and Article X of the Webster-Ashburton Treaty of 1842, 8 Stat. 572, 576-77, was signed on June 8, 1972 and entered into force on January 21, 1977, 28 U.S.T. 227, T.I.A.S. 8468. After the request had been submitted to the United States through diplomatic channels, a Special Assistant United States Attorney for the Southern District of New York, acting for and on behalf of the United Kingdom, filed an appropriate complaint in the District Court for the Southern District of New York pursuant to 18 U.S.C. §3184.[2]

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[1] Also consolidated were a petition by Mackin to this court for a writ of *habeas corpus* and a motion for immediate release.

[2] This provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge or a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken

Mackin was arrested under authority of an order of a district judge under that statute and has been held in custody since then. The complaint was referred to the Magistrate by a judge of the District Court for the Southern District of New York pursuant to Rule 9 of that court's Magistrates Rules.

The requested extradition was based upon Mackin's indictment in Northern Ireland on charges of attempted murder, on March 16, 1978, of a British soldier, Stephen Wooton, in Anderson town, Belfast, Northern Ireland; wounding Wooton with intent to do grievous bodily harm, contrary to Section 18 of the Offenses Against the Person Act of 1861; and possession of firearms and ammunition with intent, in contravention of Section 14 of the Firearms Act (Northern Ireland) 1969. Mackin was arrested in Northern Ireland after the incident but was released on bail and failed to appear for trial there, entered the United States illegally and was apprehended by the Immigration and Naturalization Service.[1]

After taking extensive evidence, receiving briefs and hearing argument, the Magistrate delivered a lengthy and thorough opinion. She concluded that the United Kingdom had satisfied its burden, under Article IX(1) of the Treaty, of producing evidence "sufficient according to the law of the requested Party . . . to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party . . ." with

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before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

The statute goes back to the Act of August 12, 1848, 9 Stat. 302. It was continued as Rev. Stat. §5270, appears as 18 U.S.C. §651 (1940 ed.), and was codified in substantially its present form in 1948, 62 Stat. 822.

[1] Although Mackin is also subject to detention by the INS pending deportation, he has consistently indicated his willingness to be deported to the Republic of Ireland and detention pending deportation would thus be brief.

respect to the first and third of the offenses charged.[4] However, the Magistrate declined to issue the certificate to the Secretary of State provided for by 18 U.S.C. §3184 on the ground that the offenses charged came within Article V(1)(c)(i) of the Treaty, which states:

> (1) Extradition shall not be granted if:
>
> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character . . . .

The Magistrate pointed to cases holding or indicating that the political offense exception is not limited to "purely" political offenses against a government, such as treason, sedition and espionage, but extends also to "relative" political offenses, to wit, crimes against persons or property which are incidental to a war, revolution, rebellion or political uprising at the time and site of the commission of the offense, see *Ornelas v. Ruiz*, 161 U.S. 502 (1896); *In re Castioni*, [1891] 1 Q.B. 149 (1890); *In re Meunier*, [1894] 2 Q.B. 415 (1894); *In re Ezeta*, 62 F. 972, 977–1002 (N.D. Cal. 1894); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5 Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Abu Eain v. Wilkes*, 641 F.2d 504, 518–23 (7 Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13, 1981). She found that: (1) at the time of the offenses charged against Mackin the Provisional Irish Republican Army (PIRA) was conducting a political uprising in the portion of Belfast where the offenses were committed; (2) that Mackin was an active member of PIRA; and (3) that the offenses committed against the British soldier were incidental to Mackin's role in the PIRA's political uprising in Belfast. Accordingly, she concluded that the crimes for which

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[4] The Magistrate's opinion does not specify which of the offenses that Mackin is charged with are supported by probable cause, *id.* at 20–21. However, for the purposes of this appeal the parties are in agreement that the Magistrate found probable cause existed only as to the first and third offenses. Government Brief at 7 n.*; Appellee's Brief at 5.

Mackin was indicted were "of a political character" within the meaning of Article V(1)(c)(i) of the Treaty.

As indicated above, the United States has appealed from the Magistrate's decision to deny the request of the United Kingdom, and in the alternative has sought mandamus to require her to grant the request. In addition to challenging the Magistrate's conclusion that Mackin's crime was "of a political character", the Government contends that decision whether an offense falls within Article V(1)(c)(i) is committed exclusively to the executive branch. Mackin contends that the Magistrate's order is not appealable because it is not a final decision of a district court of the United States within 28 U.S.C. §1291 and that this court lacks power to issue a writ of mandamus under 28 U.S.C. §1651 because of the requirement in that section that such issuance must be "necessary or appropriate in aid of . . . [an issuing court's] jurisdiction[] and agreeable to the usages and principles of law." If a contrary view should be taken on either of these points, Mackin contends that the applicability of Article V(1)(c)(i) is a question for the judicial branch and that the Magistrate's decision on the merits of that issue was correct.

Appealability

Discussion of the appealability of orders granting or denying requests for extradition must go back as far as *In re Metzger*, 46 U.S. (5 How.) 175 (1847)—a case decided just prior to enactment of the predecessor of the present extradition statute and which doubtless led to that statute's adoption, see notes 6 & 8, *infra*. Although the extradition treaty with France there at issue, 8 Stat. 580 (1848), unlike the Webster-Ashburton Treaty of the previous year with Great Britain, made no provision that the person whose extradition had been requested should be brought before a judge or magistrate "to the end that the evidence of criminality may be heard and considered", President Polk and Secretary of State Buchanan elected to submit the French Government's extradition request to Judge Betts of the

District Court for the Southern District of New York, who, after a hearing, committed Metzger to custody to await the order of the President, see *In re Metzger*, 17 Fed. Cas. 232 (No. 9511) (D.C.S.D.N.Y. 1847). Although the Supreme Court thought that in seeking a hearing before a judicial officer the executive had acted "very properly, as we suppose", 46 U.S. at 188-89, it concluded that the case "was heard and decided by the district judge at his chambers, and not in court" *id.* at 191. In that role the district judge was exercising "a special authority, and the law has made no provision for revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court." *Id.* at 191-92. Since the Supreme Court thus had no appellate jurisdiction, under the most famous of constitutional decisions it likewise could not issue a writ of *habeas corpus* on Metzger's behalf. Thus the doctrine of the unappealability of extradition decisions by judges and magistrates was born.[5]

The prime purpose of the 1848 statute, 9 Stat. 302, which followed immediately on the *Metzger* decision, was to provide additional judicial officers to handle extradition requests.[6] Nothing on the face of the statute or in its legislative

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[5] Metzger turned out to have the last laugh, see Swisher, History of the Supreme Court—the Taney Period 1836-64, 179-80 (1974).

[6] The principal purpose of the bill, as stated by Representative Ingersoll, was "to enlarge the facilities to comply with our obligations" under extradition treaties. "It often happened that an individual came to this country where the crime was obvious, and the application for the fugitive regular; but there were no such officers in the part of the country where the fugitive was found as were authorized or were willing to take on themselves the burden and the weighty responsibility of issuing a warrant to arrest and to take the preliminary proceedings toward handing over the individual to the properly authorized officer. The object of this bill was to appoint officers and to authorize others to carry out the provisions of the treaties with France and England, at all times without delay and the denial of justice. It provided for the appointment of commissioners, or authorized the courts of the United States to appoint commissioners to take the preliminary steps, and to procure the authority of the Secretary of State, to whom the treaties give authority to deliver up fugitives to foreign countries, for the accomplishment of the desired object." Cong. Globe June 23, 1848.

history shows an intention to alter the Supreme Court's ruling with respect to appealability.[7]

That question arose in *In re Kaine*, 55 U.S. (14 How.) 103, 120 (1852). Kaine was charged by the British Government with a murder in Ireland, apparently in a case having political overtones. *Id.* at 114–15. The request for extradition was made by the British Consul in New York and heard by a United States commissioner who ordered Kaine to be committed. The Circuit Court declined to issue *habeas corpus*, and Kaine sought to bring these rulings before the Supreme Court in a number of ways. Justice Curtis, concurring in a careful opinion, concluded that the Commissioner's action was unreviewable on appeal for the reason that, like the judge in *Metzger* and despite the 1848 statute, he was not exercising "any part of the judicial power of the United States", *id.* at 119; that the refusal of the Circuit Judge to issue a writ of *habeas corpus* could not be reviewed since it was not the cause of Kaine's commitment; and that the Supreme Court could not issue the writ on its own account since this would be a prohibited exercise of original jurisdiction.[8]

During the floor debates of the proposed extradition act Senator Dayton referred to the Supreme Court's decision in the *Metzger* case, but did not intimate that the bill would alter the result of that case. Cong. Globe, July 28, 1848.

The majority, speaking through Justice Catron, was at pains to make clear that its refusal of *habeas corpus* was on the merits, 55 U.S. at 117–18, without deigning to answer the jurisdictional problems developed by Justice Curtis. However, the stress laid by the majority on the need for employing magistrates "to issue the warrant, cause the arrest and adjudge the criminality", particularly in the case of criminals fleeing from Canada and caught "in hot pursuit" without any need of transmission of an extradition request through diplomatic channels in Washington since otherwise "in the entire range of country, west of the Rocky mountains, and for more than five hundred miles on this side of it, throughout the great western plains, no arrests could be made, nor would they be attempted", suggests agreement with Justice Curtis that a magistrate's action under the 1848 statute was not within the judicial power of the United States.

Justice Nelson's lengthy dissent, joined by Chief Justice Taney and Justice Daniel, apparently predicated jurisdiction on the Circuit Court's refusal to issue a writ of *habeas corpus*; he thought that decision to be "a proper subject

The decision in *Kaine* that the Act of August 12, 1848, was not intended to alter the holding in *Metzger* regarding the nonappealability of decisions granting extradition was recognized in a 1853 opinion of Attorney General Cushing to Secretary of State Marcy. The Attorney General stated, "Nor can appeal be taken from the decision of Mr. Justice Edmonds to any other court, so as to revise that decision. The judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States." 6 Op. Atty. Gen. 91, 96 (1853). Not long thereafter, the common understanding with respect to the appealability of orders denying extradition requests was reflected in another opinion rendered by the Office of the Attorney General to Secretary of State Seward in 1863, 10 Op. Atty. Gen. 501, 506. This stated unequivocally, in response to an objection by a foreign government to a district judge's denial of extradition,

> In cases of this kind, the judge or magistrate acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States. No appeal from his decision is given by the law under which he acts, and therefore no right of appeal exists. (Ex-parte Metzger, 5 How., 176; U.S. *vs.* Ferreira,

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to review by this court, by virtue of the writ of haheas corpus." 55 U.S. at 148. On the merits he held that the request must be presented through diplomatic channels and that the Commissioner had no power to act because he had not been specially authorized to do so hy a court of the United States.

Again the extraditee had the last laugh. Justice Nelson, sitting as Circuit Judge, later ordered Kaine's release on the grounds, *inter alia*, that there had been insufficient evidence of Kaine's criminality. *Ex parte Kaine*, 14 Fed. Cas. 78 (No. 7597) (C.C.S.D.N.Y. 1853).

The Act of February 5, 1867, 14 Stat. 385, ultimately vindicated Justice Nelson's position on *habeas corpus* appealability by providing for an appeal from final decisions of the circuit courts on petitions for *habeas corpus*. See *Benson v. MacMahon*, 127 U.S. 457 (1888); *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890).

> 13 How., 40–48; *in re* Kane [sic], 14 How., 103, 119, Curtis J.) The decision of Judge Leavitt is thus beyond the reach of correction either by executive or judicial power."

and suggested that the foreign government submit a new request. Further evidence of the nonappealability of orders granting extradition can be found in a Report of the Senate Judiciary Committee on the nation's extradition laws. S. Rep. No. 82, 47th Cong., 1st Sess. (1882).

The Government suggests that the basis for the nonappealability of extradition orders was altered by the creation of the courts of appeals by the Act of March 3, 1891, 26 Stat. 826, since these courts are not subject to the constitutional limitations confining them to appellate jurisdiction which played a part in the *Metzger* decision and in Justice Curtis' opinion in *Kaine*. This, however, relates to the ability of the courts of appeals to exercise original jurisdiction over petitions for writs of *habeas corpus*, and not to the appealability of decisions under §3184. It is thus not surprising that courts at every level have continued to state that decisions, even when made by district courts, denying or granting requests for extradition are not appealable under 28 U.S.C. §1291. *Collins v. Miller*, 252 U.S. 364, 369 (1920); *Caplan v. Vokes*, 649 F.2d 1336, 1340 (9 Cir. 1981); *Abu Eain v. Wilkes*, 641 F.2d 504, 508 (7 Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13, 1981); *Antunes v. Vance*, 640 F.2d 3, 4 n.3 (4 Cir. 1981); *Matter of Assarsson*, 635 F.2d 1237, 1240 (7 Cir. 1980), *cert. denied*, 101 S. Ct. 2334 (1981); *Gusikoff v. United*

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* In *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), the Court had held that a United States District Judge, acting on a claim arising under the treaty with Spain for the cession of Florida, was not exercising the judicial power of the United States and that an appeal from his decision to the Supreme Court would not lie.

It is notable that the citation of *In re Kaine*, *supra*, in the Attorney General's opinions was to Justice Curtis' concurring opinion, which the Department of Justice evidently regarded as embodying the correct view. 6 Op. Atty. Gen. 91, 96; 10 Op. Atty. Gen. 501, 506.

States, 620 F.2d 459, 461 (5 Cir. 1980); *Brauch v. Raiche*, 618 F.2d 843, 847 (1 Cir. 1980); *Hooker v. Klein*, 573 F.2d 1360, 1364 (9 Cir.), *cert. denied*, 439 U.S. 847 (1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2 Cir.), *cert. denied*, 429 U.S. 833 (1976); *Greci v. Birknes*, 527 F.2d 956, 958 (1 Cir. 1976); *United States ex rel. Sakaguchi v. Kaulukukui*, 520 F.2d 726, 729-30 (9 Cir. 1975); *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2 Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Sayne v. Shipley*, 418 F.2d 679, 685 (5 Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *Wacker v. Bisson*, 348 F.2d 602, 607 (5 Cir. 1965); *Jimenez v. Aristeguieta*, 290 F.2d 106, 107 (5 Cir. 1961). To quote from the most notable example, Justice Brandeis said in *Collins v. Miller, supra*, 252 U.S. at 369, that "the proceeding before a committing magistrate in international extradition is not subject to correction by appeal".[10] Although none of the cases cited above squarely holds that an order denying a request for extradition is not appealable, these statements are not merely dicta, as the Government argues. Along with their statements as to the nonappealability of orders granting or denying extradition requests, courts have made clear that the extraditee in cases of grant and the requesting party in cases of denial have alternative, albeit less effective, avenues of relief. The extraditee may seek a writ of *habeas corpus*, the denial or grant of which is appealable, see note 8, *supra*, and the requesting party may refile the extradition request. *Collins v. Loisel*, 262 U.S. 426 (1923); *Hooker v. Klein, supra*, 573 F.2d at 1365-66; *In re Gonzalez*, 217 F.Supp. 717 (S.D.N.Y. 1963); *Ex parte Schorer*, 195 F. 334 (E.D. Wis. 1912). Both these remedies are inconsistent with the notion that the original orders were appealable. If the grant of a request were appealable, *habeas corpus* would not lie since that writ cannot be used as a

[10] Under English law, an extraditing magistrate's decision denying extradition has been held unappealable, *Atkinson v. United States of America Government*, [1971] AC 197 at 213, [1969] 3 ALL ER 1317, HL. Lord Reid was of the view that this was "settled law" reaching back to the early 19th century, *id.* at 1324.

substitute for an appeal. *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976); *Sunal v. Large*, 332 U.S. 174, 178-79 (1947). If denial of a request were appealable, a second request would ordinarily be defeated by the principle of *res judicata*. See *Hooker v. Klein, supra*, 573 F.2d at 1367-68.

Despite the Government's argument in this case, the general belief with respect to the unappealability of extradition orders has been very recently shared by the Department of Justice and the Department of State. On September 19, 1981, Senator Thurmond, along with several colleagues, introduced "a bill developed over the past 2 years in close cooperation with the Department of Justice and the Department of State to modernize the extradition laws of the United States." 127 Cong. Rec. S9952. Among many other features, the proposed Extradition Act of 1981 confines to the Attorney General the right to file a complaint charging that a person is extraditable to a foreign country, §3192(a), provides that this may be done only in a United States district court, *id.*, directs that the court certify to the Secretary of State its findings with respect to extraditability, §3194(e), provides for appeals of such findings to the appropriate United States court of appeals, §3195(a), and limits the extraditee's rights to seek review by other means, §3195(c). Secretary of State Haig expressed the particular pleasure of the Department over several provisions of the bill, including one "which for the first time permit[s] appeal from a district court's decision on an extradition request (section 3195)", 127 Cong. Rec. S9953. A legal memorandum accompanying the proposed bill stated in unequivocal terms, 127 Cong. Rec. S9957:

> Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute

> a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious. (footnotes omitted)

At a hearing held on October 14, 1981, before the Senate Judiciary Committee, Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice, praised the bill because, among other things

> It permits both a fugitive and the United States, on behalf of the requesting country, to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus, and the only option available to the United States, on behalf of a requesting country, is to refile the extradition complaint.

Daniel W. McGovern, Deputy Legal Adviser of the Department of State, said

> Under present law there is no direct appeal from a judicial officer's finding in an extradition proceeding. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense and complication to a process which should be simple and expeditious. Section 3195 [of the proposed bill] remedies this defect in current procedure by permitting either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision.

It is true, of course, that efforts by the Government to resolve an ambiguity in legislation in its favor should not preclude it from arguing, if the efforts have not yet succeeded,

that the legislation should be construed in the manner which it asked Congress to make clear. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169-70 (1968); Sands, 2A Sutherland Statutory Construction §49.10 at 261 (1973). But here the executive branch did not tell Congress that the law was uncertain and would benefit from clarification; it said flatly that the law was the exact opposite from what it contends in this case and that the law needed to be changed. Beyond this, and apart from the massive authority we have cited, what the Government told Congress was right and what it argues to us is wrong.

The only conceivable basis for appellate jurisdiction over orders granting or denying extradition is section 1291 to Title 28 which authorizes appeals to the courts of appeals from "final decisions of the district *courts* of the United States". In contrast, §3184 proceedings are to be conducted by "any *justice* or *judge* of the United States, or any *magistrate* authorized so to do by courts of the United States or any *judge* of a court of record of general jurisdiction of any State". Decisions have noted the difference between §3184's references to "judges", "justices", and "magistrates" and §1291's reference to "district courts". *Jimenez v. Aristeguieta*, 290 F.2d 106, 107 (5 Cir. 1961); *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2 Cir.), *cert. dismissed*, 414 U.S. 884 (1973). Even when the decision to grant or deny is by a district judge, this still is not a decision of a district court within 28 U.S.C. §1291. See *Jimenez v. Aristeguieta*, *supra*, 290 F.2d at 107. Although the distinction was criticized by the dissenting judge in that case, it goes back to the Supreme Court's 1847 decision in *In re Metzger*, *supra*, and we approved of it in *Shapiro v. Ferrandina*, *supra*, 478 F.2d at 901 & n.3. It is even clearer that the decision of a magistrate is not a final decision of a district court; when Congress has desired to permit an appeal from a decision of a magistrate directly to a court of appeals, it has said so. 28 U.S.C. §636(c)(3). There is still greater difficulty in considering the

decision of a state judge to be a final decision of a district court. Yet it would be curious if such decisions were non-appealable whereas the decision of a United States judge or magistrate was.[11]

There are similar problems in reading 28 U.S.C. §1291 to include the decision of a judge of a court of appeals or a justice of the Supreme Court. It is instructive, in this regard, to examine the statutory provisions applicable to writs of *habeas corpus*, 28 U.S.C. §§2241-55. Section 2241 provides, *inter alia*, that writs of *habeas corpus* may be granted by "any circuit *judge*". Evidently fearing that, without more, the action of a circuit judge would not be reviewable, Congress provided in §2253 for an appeal from the decision of a circuit judge pursuant to §2241: "In a *habeas corpus* proceeding before a circuit or district judge, the final order

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[11] The Government suggested at argument that such a decision might be appealable through the hierarchy of state courts and would ultimately be reviewable by the Supreme Court under 28 U.S.C. §1257. We find nothing in the long history of international extradition in the United States which suggests that Congress intended state courts to have a role beyond the initial commitment proceedings: the sparsity of federal judges and commissioners in 1847 doubtless made that limited resort necessary, see note 6, *supra*. The parties cited us no state court case dealing with extradition under §3184, and our research has found none more recent than the mid-19th century. In saying this we are aware that in naturalization cases where 8 U.S.C. §1421 vests jurisdiction in both the district courts and "all courts of record in any State or Territory", 8 U.S.C. §1421, courts of appeals have routinely heard appeals from district court naturalization decisions, e.g., *Jubran v. United States*, 255 F.2d 81 (5 Cir. 1958); *Taylor v. United States*, 231 F.2d 856 (5 Cir. 1956); *Hing Lowe v. United States*, 230 F.2d 664 (9 Cir. 1956); *Brukiewicz v. Savoretti*, 211 F.2d 541 (5 Cir. 1954); *Ralich v. United States*, 185 F.2d 784 (8 Cir. 1950); *Marcantonio v. United States*, 185 F.2d 934 (4 Cir. 1950), whereas appeals from state court decisions proceed through the state systems. *In re Ramadass*, 445 Pa. 86, 284 A.2d 133 (1971) (and cases cited therein); *In re Marque's Petition*, 341 Mass. 715, 172 N.E. 2d 262 (1961); *Calo v. United States*, 400 Ill. 329, 79 N.E.2d 619 (1948); *In re Bogunovic*, 114 P.2d 581 (Cal. 1941). However, extradition has international aspects far more serious than naturalization. Moreover, the naturalization decisions occur in a statutory framework that differs in an important respect from that governing extradition. Section 1421 of Title 8 vests "the district *courts*" with jurisdiction over naturalization proceedings, and thus, there is little question but that §1291—which permits appeal from "*all*" final decisions of the "district courts"—is applicable. In contrast, as noted above, §3184 vests individual *judges* with jurisdiction over extradition requests.

shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." Congress' failure to adopt a similar statutory provision with respect to an extradition order of a circuit judge under 18 U.S.C. §3184 is evidence that it did not intend such a decision to be appealable to a court of appeals. Yet the Government has suggested no rational basis for a state of the law wherein an extradition decision of a United States district judge or magistrate would be appealable but that of a United States circuit judge would not be. When we add these considerations to the historical background of 18 U.S.C. §3184 and the many decisions we have cited,[12] we think it clear that no appeal lies under 28 U.S.C. §1291 from the Magistrate's decision here.[13]

Mandamus

The Government's alternative petition for mandamus under 28 U.S.C. §1651 encounters, as an initial obstacle, the argument that issuance of the writ is not "necessary or

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[12] The Government relies heavily on the decision in *Application of United States*, 563 F.2d 637, 641 (4 Cir. 1977), upholding §1291 jurisdiction over a district court's denial of an application under 18 U.S.C. §2518 for interception of wire or oral communications, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, which can be made to any "judge of competent jurisdiction", with successive applications also a possibility, §2518(1)(e), as in the case of extradition. Such orders lack the long history of nonappealability of those in extradition proceedings. Consequently we have no occasion to consider whether the court was correct in finding §1291 jurisdiction.

[13] The Magistrate suggested that an order upholding the political offense exception might be appealable whereas orders denying extradition for lack of sufficient evidence of probable cause were not, since the latter were akin to a preliminary hearing or a refusal of a grand jury to indict, in both of which circumstances the Government's remedy is to try again. In contrast, a ruling on the political offense exception is more like a judicial one applying law to the facts. We find nothing in the statutory language or the cases to support this distinction. Beyond this, if the Government were allowed to appeal the Magistrate's adverse finding with respect to the political offense exception, it would be hard to deny Mackin a cross-appeal from her finding of probable cause.

appropriate in aid"[1] of our jurisdiction since the Magistrate's decision is unappealable and we thus have no jurisdiction to aid. The Government replies, in part, that if we were to issue the writ and require the Magistrate to grant extradition, such a grant would almost certainly become the subject of a *habeas corpus* proceeding in the district court and its order in such a proceeding would be reviewable here under 28 U.S.C. §2253. Compare *Ex parte United States*, 287 U.S. 241 (1932) (Supreme Court has power to grant mandamus requiring a district court to issue a bench warrant for the arrest of an indicted defendant since a conviction would be reviewable by a court of appeals and, on *certiorari*, by the Supreme Court.)

We have considered somewhat similar questions in *United States v. Dooling*, 406 F.2d 192, 197, *cert. denied*, 395 U.S. 911 (1969) and *United States v. Weinstein*, 452 F.2d 704, 708-13 (1971), *cert. denied*, 406 U.S. 917 (1972). In *Dooling* we issued a writ to compel a district judge to sentence convicted defendants rather than to pursue a course, indicated by him, of dismissing the indictment upon grounds which were in part considered and rejected without leave to renew before trial by another district judge. We considered it not to be a fatal obstacle to issuance of the writ that the Government might not have been able to appeal if the judge had proceeded as he had intended, 406 F.2d at 198. In *Weinstein* we issued mandamus requiring a district judge to vacate an order dismissing an indictment after having entered a judgment of conviction although the Government could not have appealed under then existing law and the defendant obviously would not. We concluded "that the phrase 'in aid of their respective jurisdictions' should not be read so as to prohibit

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[1] The words "or appropriate" were added, apparently without explanation, in the revision of 1948. *Compare* Judiciary Act of 1789, §13 & 14, 1 Stat. 80-82; Judicial Code of 1911, §262, 36 Stat. 1162; and 28 U.S.C. §1651. See 28 U.S.C. §1651 Historical and Revision Notes.

[the courts of appeals] . . . from vacating orders, in actions generally subject to their supervision, that were beyond the power of the lower court to make, even though in the particular case there was no frustration of an appeal." 452 F.2d at 711. Quite recently the Third Circuit has upheld its power to issue a writ of mandamus to consider whether the District Court of the Virgin Islands lacked, as it thought, legal authority to convene an investigatory grand jury although no case arising from action of the putative grand jury was or, in the nature of things, could be before the court. *United States v. Christian*, No. 81-1323, decided September 30, 1981. We thus assume, at least *arguendo*, that mandamus could issue here if other tests with respect to that extraordinary remedy were met.[15]

We have discussed the standards governing issuance of the writ in a number of recent cases, e.g., *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 280-82 (1967); *Investment Properties International, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 707 (1972); *Kaufman v. Edelstein*, 539 F.2d 811, 816-19 (1976); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 181 (1979); and *In re Attorney General of the United States*, 596 F.2d 58 (1979). While some of these cases granted the writ and others denied it, all the opinions agree that mandamus is reserved for "exceptional cases", whatever that may mean, and, more informatively, that "the touchstones are usurpation of power, clear abuse of discretion and the presence of an issue of first impression." *American Express Warehousing, supra*, 380 F.2d at 283.

The only issue here raised by the Government which might qualify under these standards is its claim that the Magistrate

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[15] One reason for our assuming this only *arguendo* stems from our discussion with regard to appealability. If the Magistrate was not in fact exercising the judicial power of the United States, query whether a writ of mandamus can be issued to her by a court of appeals under 28 U.S.C. §1651, contrast 28 U.S.C. §1361.

exceeded her jurisdiction by deciding whether the offenses for which Mackin's extradition was sought came within Article V(1)(c)(i) of the Treaty rather than deferring that decision to the executive branch. If she was correct in rejecting that contention, the case would not be appropriate for mandamus since there was nothing any more "extraordinary" in her decisions as to conditions in Northern Ireland in 1978 or as to the nexus between the offenses and what she found those conditions to be than there would be in any extradition case where the political offense exception was advanced[16] and, whether right or wrong, she clearly did not abuse her discretion in deciding as she did. We will now consider whether the Magistrate's decision of the jurisdictional issue was correct.

The Magistrate's jurisdiction to decide the political offense question

The Government's argument that the Magistrate had no jurisdiction to decide the political offense question begins with the language of the Treaty. Article V(1)(c)(i) speaks of an offense which "is regarded by the requested Party as one of a political character." As a matter of the ordinary meaning of language, "the requested Party" would seem in this case to be the Government of the United States, represented, as is uniformly true in matters of foreign relations, by the President, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); L. Henkin, Foreign Affairs and the Constitution 45-50, 93 (1972), and not by a judicial officer. The Government asserts that this construction is reinforced by other provisions of the Treaty, notably Articles XIV(1)

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[16] It is noteworthy that, despite the claims in the Government's brief, at 25-26, that a failure to obtain the extradition of Mackin would have "the potential for causing a significant interference in our relations with the United Kingdom", no affidavits from State Department or other Government officials attesting to this danger were submitted to the Magistrate, as was done in *In re Attorney General, supra*, 596 F.2d at 64 (affidavit of the Attorney General that "the failure to recognize the privilege would adversely affect the entire law enforcement and intelligence-gathering apparatus of the United States.").

and XI(1), where it claims the term "requested Party" must mean the Government of the United States and not the courts.[17] It tells us further that the phrase "regarded by the requested Party as one of a political nature" represents a change from the language of older treaties and argues that by calling for the subjective opinion of the requested Party, the Treaty thus refers to the Secretary of State.

The Government's argument ignores the fact that the "new" language or an equivalent has been used in United States treaties at least since the turn of the century. The Extradition Treaty with Peru, 31 Stat. 1921 (1900), at issue in *Garcia-Guillern v. United States*, *supra*, 450 F.2d 1189, contained a provision stating "[i]f any question shall arise as to whether a case comes within . . . [the political offense exception] the decision of the authorities of the government on which the demand for surrender is made . . . shall be

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[17] Article XI(1) of the treaty provides that "[t]he requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition." This provision hardly establishes that "requested Party" "can refer only to the Government (*i.e.*, the State Department)", as the Government's brief asserts, p. 28. The term "requested Party" is most naturally interpreted as a reference to the government of the United States or Great Britain, as the case may be, without any intent to refer to a particular branch of those governments. The separate reference to "the diplomatic channel" would be unnecessary if "requested Party" did in fact mean the State Department.

Article XIV(1) of the treaty provides "[t]he requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition." It does this provision no violence to read it as fixing the international legal obligations of the United States and Great Britain without speaking to the manner in which each nation goes about meeting these obligations as a domestic matter.

Against this Mackin argues that the Government's equation of "the requested Party" with the executive branch does not fit Article V(2) which provides that extradition may be refused on any ground specified by "the law of the requested Party". This same argument applies to the numerous references in the treaty to "the territory of the requested Party", e.g., Arts. VI, VII, VIII, and IX. Likewise, Article VII(5)(a) speaks of certification of arrest warrants by "a judge, magistrate or other competent authority of the requesting Party", a usage inconsistent with the notion that "requesting Party" refers specifically to the executive branch.

final." Identical language was contained in a 1901 treaty with Servia, 32 Stat. 1890, Art. VI. If anything, reference to the "authorities" of the United States Govenment is more suggestive of the executive branch than is the broader phrase, "requested Party", at issue in this case, thus undercutting the Government's theory that the "requested Party" language was intended to change existing law. Moreover, the phrase "requested Party" was used in the 1963 Extradition Treaty with Israel, 14 U.S.T. 1707, Art. VI(4), as to which the Seventh Circuit has rejected an argument by the Government similar to that here considered, see *Abu Eain v. Wilkes, supra*, 641 F.2d at 517. See also Extradition Treaty with Brazil, 15 U.S.T. 2093 (1961).

The Government's textual argument also ignores the existence of numerous treaties whose language explicitly envisions that courts will decide the political offense question. For example, a 1932 extradition treaty with Greece provides that "[t]he State applied to, or courts of such State, shall decide whether the crime or offense is of a political character", 47 Stat. 2185. See also Treaty Concerning the Mutual Extradition of Criminals with Czechoslovakia, 44 Stat. 2367 (1925); Treaty of Extradition with Albania, 49 Stat. 3313 (1935); Treaty for the Extradition of Fugitives from Justice with Austria, 46 Stat. 2779 (1930). The Government has suggested no reason, and we are unable to envision any, why courts should determine political offense questions under some treaties, but not under others. If the State Department had wanted to change the rule reflected in the above treaties and in the cases cited *infra*, it would hardly have done so on a piecemeal basis in treaties with individual foreign states and without disclosing its intention to the Senate.[18] Rather it would have adopted the more open and decisive approach

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[18] As far as we are aware, following Justice Nelson's opinion in *Ex parte Kaine, supra*, the argument that the "requested party" language made the political offense decision solely for the executive branch was not made again until 1980 in *Abu Eain, supra*.

of seeking legislation, as it is currently attempting to do, see p. 28, *infra*. It seems much more likely that the language was intended to preclude a foreign state from arguing that the United States was bound by a definition of political offense derived from international law or the law of the requesting state.

The Government seeks to buttress its textual argument with arguments of policy and analogy. It calls attention to decisions that determination whether a case falls within the exception provided by Article V(i)(c)(ii), to wit, that "the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character" lies solely with the executive branch. See *In re Lincoln*, 228 F. 70, 73-74 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *Garcia-Guillern v. United States*, *supra*, 450 F.2d at 1192; *In re Gonzalez*, 217 F.Supp. 717, 722 (S.D.N.Y. 1963). Recognizing the latter principle, the Seventh Circuit in *Abu Eain*, *supra*, 641 F.2d at 316-17, perceived no inconsistency between confiding to the courts a decision with respect to past facts and refusing to allow them to probe the motives of a requesting government—a conclusion with which we agree. The Government notes that a judicial decision on the political offense exception may cause difficulties in this country's foreign relations; such difficulties would exist also, indeed might be heightened, if decision were placed solely in the executive branch, unless the political offense exception were to be eviscerated in practice in the case of extradition treaties with nations with which we are allied or whose favor we especially desire. See also I.A. Shearer, Extradition in International Law 197-98 (1971). The Government relies on cases such as *The Three Friends*, 166 U.S. 1 (1897), and *Underhill v. Hernandez*, 168 U.S. 250 (1897), holding that determination when a state of war or belligerancy exists in a foreign country is solely for the executive; these are adequately distinguished in the Seventh Circuit's opinion in *Abu Eain*, 641 F.2d at 514 n.14. That court likewise sufficiently answered, *id.* at 514–15, the

arguments made here by the Government, on the basis of *United States v. Curtiss-Wright Export Corp., supra*, and *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), as to the special ability of the executive branch to acquire the facts with respect to conditions in foreign countries.

Moreover, whatever we might decide if we were writing on a clean slate, the rock on which the Government's arguments shatter is the long-standing recognition that courts shall determine whether a particular offense comes within the political offense exception. This principle was in existence at least as long ago as when *In re Kaine, supra*, was decided in 1852. Four years after enactment of the Act of August 12, 1848, Justice Catron, speaking for four members of the Supreme Court, wrote that "extradition without an unbiased hearing before an independent judiciary ... [is] highly dangerous to liberty, and ought never to be allowed in this country", *In re Kaine, supra* 55 U.S. at 113. Although this statement is directed at extradition proceedings in general and not specifically at the political offense issue, Justice Catron's opinion gives no indication that the political offense issue ought to be treated differently from other issues at the extradition hearing. More importantly, an example cited by Justice Catron, relating to the alleged mistreatment of one Jonathan Robbins, suggests that the members of the Court joining in his opinion were of the view that "an unbiased hearing before an independent judiciary" was particularly necessary in cases where the political offense exception is at issue.

In 1799 Jonathan Robbins (also variously referred to as Thomas Nash and Nathan Robbins) was surrendered by the United States to British naval officials, pursuant to Article 27 of Jay's Treaty. The British sought Robbins' extradition for a murder allegedly committed aboard a British naval vessel. Jay's Treaty contained no provision regarding the procedure to be followed in extradition cases, and at the time there was no legislation on the subject. Believing he had

a relatively free hand, President Adams arranged the delivery of Robbins by instructing District Judge Bee of South Carolina to hand the extraditee over to the British. Adams' action caused an extraordinary national outcry. See, e.g., 10 Annals of Congress 580-640 (1800). As Professor Moore notes, "[t]he case created great excitement, and was one of the causes of the overthrow of John Adams' administration." 1 Moore, Extradition 550-51 (1922); see also *In re Kaine*, 55 U.S. at 111–12. The outcry against Adams' action seems to have arisen, in large part, from the widespread perception that Robbins was an American seaman who had been impressed into the British navy and that the murder for which he was charged had occurred either in the course of a mutiny or while fleeing from the British in an escape attempt. See Speech of John Marshall, 10 Annals of Congress 613 (1800), reprinted in, 18 U.S. at 5 Wheat, App. 201, 204–05, 215 (1820). Robbins' supporters apparently conceded that he had committed a murder, yet argued that a murder committed in fleeing from illegal impressment should not be extraditable.

Although the term "political offense" was not current at the time, and apparently was not used in the debates surrounding the Robbins case, 10 Annals of Congress 580-640 (1800), the argument made on Robbins' behalf bears many resemblances to the political offense doctrine. In both instances an otherwise extraditable crime is thought to be rendered nonextraditable by the circumstances surrounding its commission and by the motives of the criminal. Significantly, in later years the Robbins case came to be regarded as centering on the political offense question. As Justice Nelson wrote in *Ex parte Kaine*, 14 Fed. Cas. 78, 81 (No. 7597) (C.C.S.D.N.Y.) (1853), "It was the apprehension of the people of this country, at the time, that the offense of Jonathan Robbins, who was delivered up under the treaty with Great Britain of 1794, was a political offense...."

The circumstances of the Robbins case described above assume importance because, as Justice Catron noted in *In re*

Kaine, supra, "[t]hat the eventful history of Robbins' case had a controlling influence on our distinguished negotiator [Daniel Webster], when the Treaty of 1842 was made; and especially on Congress, when it passed the Act of 1848, is, as I suppose, free from doubt." 55 U.S. at 112. With the Robbins case thus firmly in the legislature's mind, it is difficult to avoid the conclusion that when Congress charged commissioners and judges with determining whether evidence exists to "sustain [a] charge under the provisions of ... [a] treaty", 9 Stat. 302, sec. 1, it had no intention of silently excepting the political offense issue from the magistrates' consideration. Rather, the combination of the view that the Robbins case involved the political offense question, and the perception that extradition without judicial oversight was "highly dangerous to liberty and ought never to be allowed in this country", *In re Kaine, supra* 55 U.S. at 113, strongly suggests that it was precisely the political offense question that was of the greatest concern to Congress in passing the Act of August 12, 1848. This view is buttressed by the references to the political offense issue in the debates on the act, see Cong. Globe, July 28, 1848 (remarks of Mr. King and Mr. Bedger).

We recognize that Justice Nelson's later opinion as a Circuit Judge in *Ex parte Kaine, supra,* 14 Fed. Cas. at 81, contained language suggesting that decisions concerning the political offense exception are solely for the executive branch. Justice Nelson wrote "the surrender, in such cases, involves a political question, which must be decided by the political, and not by the judicial, powers of the government. It is a general principle, as it respects political questions concerning foreign governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and is, therefore, presumed to best understand what is fit and proper for the interest and honor of the country." We think Justice Nelson misunderstood the import of the Robbins incident, and that Justice Catron's view of the mistrust of exclusion of the judiciary from the extradition

process is a far sounder interpretation of the views of the times. Moreover, this view is more consistent with the concern with individual liberties that formed the basis for Justice Nelson's dissenting opinion in *In re Kaine, supra*, 55 U.S. at 141-42, 147. If there is to be a change in this, the alteration should come from Congress.

The doctrine that decisions with respect to the political offense exception is for the courts was also recognized in *In re Castioni, supra*, [1891] 1 Q.B. 149, although, as the Government points out, there was no need to address the question there since the British Extradition Act of 1870 provided a defense to any person who could "prove to the satisfaction of the ... magistrate or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." 33 & 34 Vict., c. 52, §3(1). In *In re Ezeta*, 62 F. 972 (N.D. Calif. 1894), the court assumed that it had power to determine whether the offense was political. It evidently regarded this as part of its duty, imposed by 18 U.S.C. §3184, to hear and consider the evidence of criminality and to determine whether there is evidence "to sustain the charge under the provisions of the treaty". In *Ornelas v. Ruiz*, 161 U.S. 502 (1896), the Supreme Court reversed a ruling by a district judge discharging, as a political offender, a person whom a magistrate had found not to be one; the Court expressed no disapproval at the magistrate's having decided the question, although saying, *id.* at 512, that "[t]he contention that the right of the executive authority to determine what offenses charged are or are not purely political is exclusive is not involved in any degree." The principle that the judicial officers named in §3184 are to determine whether or not the crime charged is a political offense has been sustained in a number of other reported cases, *Jimenez v. Aristeguieta*, 311 F.2d 547 (5 Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5 Cir. 1962); *Shapiro v. Ferrandina*, 478 F.2d 894 (2

Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Jhirad v. Ferrandina*, 536 F.2d 478 (2 Cir.), *cert. denied*, 429 U.S. 833 (1976); *Abu Eain v. Wilkes*, 641 F.2d 504 (7 Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13, 1981); *In re Lincoln*, 228 F. 70, 74 (S.D.N.Y. 1915) (dicta); *United States ex rel. Karadzole v. Artukovic*, 170 F.Supp. 383 (S.D. Cal. 1959); *Ramos v. Diaz*, 179 F.Supp. 459 (S.D. Fla. 1959); *In re Gonzalez*, 217 F.Supp. 717 (S.D.N.Y. 1963), although only *Abu Eain* and *In re Lincoln* contain discussion of the issues.

One reason for the lack of discussion is that the position that the judicial officers designated in §3184 lack power to determine whether the offense was political is a new one for the executive branch. In 1908, a foreign ambassador wrote to the Secretary of State, proposing that a provision be included in the extradition treaty about to be entered into, whereby the political offense determination would be made by the courts of the requested country. In response, Secretary Elihu Root wrote:

> According to the system of jurisprudence obtaining in the United States, *the question as to whether or not an offense is a political one is always decided in the first instance by the judicial officer* before whom the fugitive is brought for commitment to surrender. If the judicial authorities refuse to commit the fugitive for surrender on the ground that he is a political offender, or for any other reason, the matter is dead.... Bearing in mind, therefore that under our system of jurisprudence, it is not possible for any fugitive who claims to be a political offender to be extradited, it is hoped that your Government will be satisfied without insisting upon the insertion of an express stipulation providing that the question as to whether an offense is political shall be decided by the judicial authorities. (Emphasis added.)

Letter from Secretary of State Root, dated June 12, 1908; quoted in 4 G. Hackworth, Digest of International Law 46

(1942). In 1960 the Assistant Legal Adviser to the Department of State wrote a United States Attorney:

> With regard to the assertion that Mylonas' extradition is being sought for acts connected with crimes or offenses of a political character, it should be noted that *this is a matter for decision, initially, by the extradition magistrate* on the basis of the evidence submitted to him. (Emphasis added.)

Letter of State Department Assistant Legal Advisor to U.S. Attorney, dated June 22, 1960, concerning *In re Mylonas*, 187 F.Supp 716 (N.D. Ala. 1960); cited in 6 M. Whiteman, Digest of International Law 842-853 (1968).[14] The view of the Department of Justice and the Department of State with respect to the existing law appears also in the materials recently presented to the Senate in connection with S. 1639, §3194(a) of which would remove from the court's jurisdiction "to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." The Senate was told in the Legal Memorandum accompanying the bill, 127 Cong. Rec. S9956 (Sept. 18, 1981):

> Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense...

citing in n.56 four of the cases cited above. An almost identical statement was made by Deputy Legal Adviser McGovern, p. 4.

It follows that, as the law now stands, both the judicial and the executive branches have recognized that, under

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[14] The word "initially" refers to the fact that when the judicial officer on a *habeas* court decides that the offense is not political, the Secretary of State may still decline to order extradition. See Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313, 1315 & cases cited in note 18 (1962); 1 Moore, *Extradition* 549-76 (1891); Hyde, *International Law*, 606-08 (1922).

§3184, decision whether a case falls within the political offense exception is for the judicial officer. The Government cites us to no overriding principle which dictates a contrary result. The Court said in *Baker v. Carr*, 369 U.S. 186, 211, 212 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" and "a court can construe a treaty and may find it provides the answer." While the policy arguments made by the Government are not without force, particularly in an age of spreading terrorism, they are not so overwhelming as to justify us in concluding that the 1848 statute and its successors did not mean that the judicial officer should decide whether the offense for which extradition is sought is political. Whether the national interests would be better served by the position here advocated by the executive branch, which it has asked Congress to adopt in S. 1639, is for that body to determine. We therefore conclude that the Magistrate correctly sustained her own power to decide the political offense question and thus, for reasons heretofore explained, there is no basis for our issuing mandamus.

Mackin's Habeas Corpus Petition

Immediately after the Magistrate's decision the Government refiled its extradition request before District Judge Sand in accordance with the procedure recognized in *Hooker v. Klein, supra*, 573 F.2d 1360, and applied for a new warrant of arrest. Believing that the question of appealability should be resolved before action by him the judge held this request in abeyance pending a request for a stay to the Magistrate. She granted such a stay pending application to this court for a stay pending expedited appeal, which this court granted. Before we granted the stay, Mackin filed a petition for *habeas corpus* with this court and a motion for immediate release. Since our stay of the Magistrate's decision will terminate upon the coming down of the mandate, unless the Government should request and we should see fit to grant an extension of the stay pending application for certiorari or

the decision of the renewed application before Judge Sand, we must consider the petition for *habeas corpus*.

This need not detain us long. The statute, 28 U.S.C. §2241, provides that writs of *habeas corpus* may be granted by "the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions." A court of appeals is conspicuously absent from this list. It has repeatedly been held that courts of appeals have no jurisdiction to entertain petitions such as Mackin's. *Posey v. Dowd*, 134 F.2d 613 (7 Cir. 1943); *Jensen v. Teets*, 219 F.2d 235 (9 Cir. 1955); *Loum v. Alvis*, 263 F.2d 836 (6 Cir. 1959); *Parker v. Sigler*, 419 F.2d 827 (8th Cir. 1969). See also FRAP 22(a) and accompanying Notes of Advisory Committee on Appellate Rules.

The Government's appeal is dismissed for lack of jurisdiction. Its alternative application for mandamus is entertained solely on the issue of the Magistrate's jurisdiction to rule on the political offense exception and is otherwise dismissed; the portion entertained is denied on the merits. Mackin's petition for *habeas corpus* is dismissed for want of jurisdiction. Mackin may recover his costs.

the two principal shareholders of the company that it was not yet time to quit and to return to work. However, Ellis refused to do so and referred to the shareholder as a "son-of-a-bitch." When she continued to refuse to work, she was discharged. Although the Administrative Law Judge found, as here, that vulgar language was not uncommon in the plant, those using it, apart from Ellis, did not refer to their supervisors in profane terms in their presence. Because of her aggravated conduct toward a superior, the court held that Section 7 did not operate to suspend the company's right to discharge Ellis for cause (497 F.2d at 452).

Similarly, in *National Labor Relations Board v. Prescott Industrial Products Company*, 500 F.2d 6 (8th Cir. 1974), the court refused to enforce the Labor Board's order to reinstate with back pay three employees who had been discharged for insubordination where the employees had been disruptive and used abusive language directed at management during a plant manager's lawful speech to a group of employees.

Finally, in *Boaz Spinning Company v. National Labor Relations Board*, 395 F.2d 512 (5th Cir. 1968), the company had discharged R. C. Alexander for insubordination. During a meeting called by the plant manager, the employees were told they could not make speeches but that after the plant manager's speech he would try to answer any employee questions. When Alexander attempted to make a talk after the close of the plant manager's speech, the plant manager told him to sit down until the plant manager finished answering questions. However, after sitting down momentarily, Alexander jumped up and pointed his finger at the plant manager and said that he was "no different than Castro." Alexander was thereupon fired for insubordination. The court of appeals agreed with the trial examiner that Alexander's Castro remark was made in a deliberate and defiant manner and was a form of flagrant disloyalty warranting his immediate discharge. The Labor Board had disagreed with the trial examiner and ordered his reinstatement. There, as here, the employee was violating the employer's rules and using intemperate language in front of other employees. Consequently, the company was upheld in ordering his discharge and the Board's petition to enforce its order was denied.

In our view, the above-cited authorities control the disposition of this case, where Boyle's complaint about Sullair's new gas policy was not even "a motivating factor" in his discharge. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (August 27, 1980). Since Boyle's offensive conduct on June 1st was found by the Labor Board to be "the overriding reason" for his discharge,[4] Sullair did not violate Section 8(a)(1) of the Act. Accordingly, enforcement will be denied.

Ziyad Abu EAIN, Petitioner-Appellant,

v.

Peter WILKES, United States Marshal for the Northern District of Illinois, Respondent-Appellee.

No. 80-1487.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 26, 1980.

Decided Feb. 20, 1981.

Rehearing and Rehearing En Banc Denied April 13, 1981.

Petitioner sought a writ of habeas corpus to prevent the Secretary of State from

4. Our own decisions hold a discharge to be illegal if a "bad" motive contributes in a significant way to the discharge. *E. g., National Labor Relations Board v. Pfizer, Inc.*, 629 F.2d 1272, 1275, 1277 (7th Cir. 1980) (*per curiam*). Here there was no substantial evidence to support a finding of a bad motive.

extraditing him in accordance with the determination of a magistrate. The United States District Court for the Northern District of Illinois, Eastern Division, Frank J. McGarr, J., denied the writ. On appeal by the petitioner, the Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) evidence was sufficient to sustain the magistrate's finding of probable cause; (2) it is within Secretary of State's sole discretion to determine whether or not country's requisition for extradition is made with view to try or punish fugitive for political crime, i. e., whether request is subterfuge, but judicial branch has consistently determined whether "political offense" provision of extradition treaties applies to crime charged; and (3) petitioner at extradition hearing failed to shoulder burden of satisfying magistrate of direct tie between Palestine Liberation Organization and specific violence alleged, and failed to show that bombing was incidental to conflict in Israel so as to be act covered within political offense exception to extradition provision of treaty.

Affirmed.

1. Extradition and Detainers ⇐14(2)

Accomplice testimony is competent to support finding of probable cause, and may be of particular importance in extradition cases where all alleged criminal activity occurred in distant country. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

2. Extradition and Detainers ⇐14(2)

Where statements of accomplice were admissions against his own penal interest, they were deemed reliable, in extradition proceeding, the prejudice to accomplice in making the statement having the effect of strengthening its supportive character. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr. Proc. Rule 54(b)(5), 18 U.S.C.A.

3. Extradition and Detainer ⇐14(2)

Where testimony of accomplice is corroborated by further facts there is sufficient evidence to show probable cause, for purposes of extradition. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

4. Criminal Law ⇐211(3)

Issue of corroboration generally arises in context of search warrants, but same standards are applicable to issuance of arrest warrant.

5. Extradition and Detainers ⇐14(2)

Statements of accomplice, corroborated by statements of investigating police officer and of cousin of accomplice and by inferences that might be drawn from petitioner's own conduct of concealment and flight were sufficient to support magistrate's finding of probable cause for arrest for extradition. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

6. Extradition and Detainers ⇐14(1, 2)

Accused in extradition hearing has no right to contradict demanding country's proof or to pose questions of credibility as in ordinary trial, but only to offer evidence which explains or clarifies that proof, and magistrate did not err in refusing to admit statements in which accomplice and cousin of accomplice allegedly recanted the earlier statements regarding petitioner's role in bombing. 18 U.S.C.A. §§ 3181–3195; Fed. Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

7. Criminal Law ⇐304(1)

Court of Appeals could not take judicial notice that Israel routinely tortures prisoners; judicial notice can be taken only of matter not reasonably subject to dispute and which is generally known to court or otherwise is capable of accurate and ready determination by sources that cannot reasonably be questioned. Fed.Rules Evid. Rule 201, 28 U.S.C.A.

8. Extradition and Detainer ⇐9

It is within Secretary of State's sole discretion to determine whether or not country's requisition for extradition is made with view to try or punish fugitive for political crime, i. e., whether request is subterfuge, but judicial branch has consistently determined whether "political offense" provision of extradition treaties applies to crime charged. 18 U.S.C.A. § 3184.

9. Constitutional Law ⇐72

Construing application of treaty's political offense exception clause in extradition provision does not require initial policy determination of kind clearly for nonjudicial discretion. 18 U.S.C.A. § 3184.

10. Extradition and Detainers ⇐14(1)

Court does not leave to executive branch sole determination as to whether offense for which extradition is sought by foreign country is "political offense" but views of executive branch are entitled to great weight in extradition matters. 18 U.S.C.A. § 3184.

11. Extradition and Detainers ⇐5

Before act may be found to constitute political offense, for purposes of determining applicability of extradition treaty, magistrate must make two basic determinations, i. e., whether there was violent political disturbance in requesting country at time of alleged acts and whether acts charged were recognizably incidental to the disturbance, and magistrate's legal determination that person that is extraditable does not bind or control later political conclusion of Secretary of State, but if magistrate concludes that individual is not extraditable, it is up to Secretary to decide whether or not to pursue issue before another magistrate. 18 U.S.C.A. § 3184.

12. Extradition and Detainers ⇐5

Though treaty between United States and state of Israel provided that extradition was not to be granted when offense was regarded "by the requested Party" as one of political character, treaty did not by its own terms leave to sole discretion of executive branch determination whether alleged act for which extradition was sought was of political nature. 18 U.S.C.A. § 3184.

13. Extradition and Detainers ⇐14(1)
Constitutional Law ⇐72

Court had no jurisdiction to determine requesting country's motives under extradition treaty between the United States and Israel, and determination whether request for extradition on common crimes amounted to subterfuge by Israel to punish petitioner for political offense was decision within sole province of Secretary of State. 18 U.S.C.A. §§ 3184, 3188.

14. Extradition and Detainers ⇐5

Operative definition of "political offenses" under extradition treaties as construed by United States limits such offenses to acts committed in course of and incidental to violent political disturbance such as war, revolution or rebellion. 18 U.S.C.A. § 3184.

See publication Words and Phrases for other judicial constructions and definitions.

15. Extradition and Detainers ⇐14(2)

Petitioner at extradition hearing failed to shoulder burden of satisfying magistrate of direct tie between Palestine Liberation Organization and specific violence alleged, and failed to show that bombing was incidental to conflict in Israel so as to be act covered within political offense exception to extradition provision of treaty. 18 U.S.C.A. § 3184.

16. Extradition and Detainers ⇐5

Motivation is not alone determinative of political character of any given act for which extradition is sought, as bearing upon applicability of "political offense" exception to treaty provisions for extradition. 18 U.S.C.A. § 3184.

17. Extradition and Detainers ⇐5

For purposes of extradition, indiscriminate bombing of civilian populus is not recognized as protected political act even when a larger "political objective" of person who sets off bomb may be to eliminate civilian population of country. 18 U.S.C.A. § 3184.

18. Extradition and Detainers ⇐5

Offense having its impact upon citizenry but not directly upon government does not fall within political offense exception to extradition provisions of treaty. 18 U.S. C.A. § 3184.

Ramsey Clark, New York City, for petitioner-appellant.

Thomas P. Sullivan, U. S. Atty., Chicago, Ill., for respondent-appellee.

Before PELL, Circuit Judge, SKELTON, Senior Judge,* and WOOD, Circuit Judge.

HARLINGTON WOOD, Jr., Circuit Judge.

Petitioner Abu Eain is accused by the State of Israel of setting a bomb on May 14, 1979, that exploded during the afternoon in the teeming market area of the Israeli city of Tiberias,[1] killing two young boys[2] and maiming or otherwise injuring more than thirty other people. Israel seeks the extradition of petitioner from the United States. Petitioner, a resident of the West Bank area of the Jordan River, traveled to Chicago, Illinois via Jordan shortly after the Tiberias bombing incident. Pursuant to an extradition treaty between the United States and Israel, and in accordance with the federal statute governing American extradition procedure, 18 U.S.C. § 3184, a magistrate in the Northern District of Illinois after a hearing determined that defendant should be extradited to Israel to stand trial for murder, attempted murder and causing bodily harm with aggravating intent. Petitioner then sought a writ of habeas corpus from the district court (there being no provision for direct appeal) to prevent the Secretary of State from extraditing him in accordance with the magistrate's determination. The district court denied the writ. We affirm.

Petitioner contends that the evidence fails to establish probable cause to believe that he committed the crimes charged.[3] Alternatively, petitioner argues that if the evidence is sufficient to show probable cause, then the crimes of which he is accused do not fall within the terms of the treaty providing for extradition. Petitioner claims that it is apparent that the bombing was politically motivated and that political offenses of that kind are excepted from the extradition treaty. Petitioner further contends that if the bombing was not within the political offense exception, then Israel's "indictment" of him for the alleged crimes amounts only to a subterfuge in order to have him returned for trial, not for the alleged offenses, but instead for the political offense of membership in the Al Fatah branch of the Palestine Liberation Organization (PLO).[4]

I. The Process of Extradition

The Extradition Treaty between the United States and Israel became effective in 1963. 14 U.S.T. 1707. Article II of that Treaty provides, *inter alia*, for extradition of persons accused of murder and infliction of grievous bodily harm, as well as attempts to commit those crimes. Article V of the Treaty provides that a person may be extradited only if the evidence is "found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in that place. . . ." This form of treaty provision has been held to require a finding of probable cause under federal

* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

1. Tiberias is a popular resort town on the west coast of the Sea of Galilee.

2. At the time Tiberias was unusually crowded with young people gathering for a youth rally.

3. Originally petitioner contended that he was not the person charged in Israel. The government presented fingerprint and photographic evidence identifying petitioner as being the person both charged and sought to be extradited. The identity issue has not been raised on appeal by petitioner.

4. For purposes of this opinion, we will refer to both the Palestine Liberation Organization and Al Fatah by the initials "PLO."

law. *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973).

As an exception to the foregoing Treaty provisions, Article VI, paragraph 4 of the Treaty states that extradition shall not be granted "[w]hen the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character."

Since the technical aspects of extradition procedure are not explicitly stated in the Treaty, this country's laws guide the manner in which a decision is made whether or not an individual may be extradited from this country to Israel. We briefly discuss the provisions of the laws of the United States concerning extradition since the arguments of both petitioner and the government on the facts of this case and their contentions on what the law requires can best be understood in the context of overall extradition procedure which varies from the common interstate process.

The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181–3195. In brief, the statutes require that a country seeking extradition of an individual submit to our government through proper diplomatic channels a request for extradition. That request must in general be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable offenses in the Treaty and that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States. After evaluation and approval by the Department of State, the necessary papers may be forwarded to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney may then file a complaint and seek an arrest warrant from a magistrate. If a warrant issues the magistrate then conducts a hearing under 18 U.S.C. § 3184 to determine "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention...." The Federal Rules of Evidence and Criminal Procedure do not apply in such a hearing. Fed.R.Evid. 1101(d)(3); Fed.R.Crim.Proc. 54(b)(5). It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing. The person charged is not to be tried in this country for crimes he is alleged to have committed in the requesting country. That is the task of the civil courts of the other country.

Under § 3184, should the magistrate either determine that the offense charged is not within a treaty's terms or find an absence of probable cause, the magistrate cannot certify the matter to the Secretary of State for extradition. If the case is certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender. *See* 4 G. Hackworth, Digest of International Law, § 316, pp. 49–50 (1942); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962).

The government cannot take a direct appeal from the magistrate's decision not to certify the case. There also is no statutory provision for direct appeal of an adverse ruling by a person whose extradition is sought. Instead, that person must seek a writ of habeas corpus. *Collins v. Miller*, 252 U.S. 364 (1920); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976). The scope of habeas corpus review in extradition cases is a limited one, according due deference to the magistrate's initial determination. *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925). *See In the Matter of Assarsson*, 635 F.2d 1237 (7th Cir. Oct. 31, 1980); *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932); *Ornelas v. Ruiz*, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1896). The district judge is not to retry the magistrate's case.

"[H]abeas corpus is available only to inuire whether the magistrate had jurisdicon, whether the offense charged is within e treaty and, by a somewhat liberal exnsion, whether there is any evidence warnting the finding that there was reasonae ground to believe the accused guilty." ernandez v. Phillips, 268 U.S. at 312, 45 .Ct. at 542 (per Holmes, J.) (emphasis supplied). The magistrate is obliged to deterine whether there is probable cause to elieve that an offense was committed and iat the defendant committed it. 18 U.S.C. 3184; Benson v. McMahon, 127 U.S. 457, 62-63, 8 S.Ct. 1240, 1243, 32 L.Ed. 234 1888); M. C. Bassiouni, International Extradition and World Public Order 516-18 1974) (hereinafter cited as "Bassiouni"). The extradition process has not been chalenged in this case by petitioner, but the government has raised a question about the scope of the magistrate's authority.

II. Probable Cause

Petitioner first challenges the sufficiency of the evidence to sustain the magistrate's finding of probable cause. Our scope of review on this issue is limited to determining whether there is "any evidence" to support the magistrate's finding of probable cause. We conclude that the magistrate's determination was supported by sufficient evidence.

Petitioner's hearing before the magistrate lasted seven days. During the hearing sworn statements of Jamil Yasin, Mufida Jaber and Israeli Police Captain Peretz were introduced as evidence. The admissibility of those exhibits was not challenged by petitioner.

According to Yasin's statement, Yasin and petitioner traveled to Tiberias on May 11, 1979 for "reconnaissance" purposes in connection with their membership in the PLO. The two men were scouting for a location in which to place a bomb. On May 14, the celebration day of Israel's Independence, Yasin prepared an explosive charge which he gave to petitioner with an explanation as to its operation. Petitioner left Yasin's home for Tiberias at 9:00 a. m. on May 14 with the charge, and returned about 4:30 p. m. Petitioner went alone to Tiberias because he was concerned that Yasin might be recognized since "there were many people who knew [him]." Government Exhibit 1, "Statement by Yasin." Yasin gave petitioner instructions to place the bomb in a public area, and cautioned him to avoid military vehicles. On his return from Tiberias, petitioner told Yasin that he put the charge in a refuse bin in the center of town. The next day, May 15, Yasin met with petitioner and told him of news reports of the bomb's explosion in Tiberias, stating "the operation had succeeded." The substance of those events was also supported by the statement of Captain Peretz, the head of a special Israeli police team investigating the bombing. On May 17, 1979 Yasin, according to his statement, sent a letter to petitioner which was delivered by Yasin's cousin, Mufida Jaber. Yasin sent the letter after hearing that a person named "Ataf" had been arrested. In her sworn statement Mufida Jaber describes the contents of the note as: "To Ziyad, Talila, Jan and Umm Ammar, has been caught. Be careful." (Petitioner is known by the names Ziyad and Talila.) After reading the message, petitioner told Jaber that he wanted to go to America through Amman, Jordan. On May 20, 1979 petitioner obtained a visa to the United States, and on June 5 he crossed into Jordan with an Israeli transit permit, arriving in Chicago, Illinois, on June 14, 1979. In Chicago, petitioner took up residence with his sister and her husband, Ahmad Yusuf.

On August 17, 1979 agents of the Federal Bureau of Investigation (FBI) went to Yusuf's residence with a warrant for the arrest of petitioner. The agents advised those present of the warrant, mistakenly stating that the request for petitioner's arrest came from Jordan, not Israel. Petitioner was present but lied to the agents about his true identity, giving the name of Kamal Yusuf. At the agents' request, petitioner and another man who was also present accompanied the agents to the FBI field office, where both were fingerprinted and photographed before being taken back

to Yusuf's. The FBI subsequently received fingerprints from Israel which matched those taken from "Kamal Yusuf," who was in fact the petitioner. The agents returned to the Yusuf residence on August 22, 1979 to arrest petitioner, but he was no longer there. When informed of the legal consequences of harboring a fugitive, Ahmad Yusuf, petitioner's brother-in-law, who first claimed he did not know where petitioner was, made telephone calls, one in Arabic and one in English, in the second of which he was heard to say he wanted petitioner to come to his apartment to talk with Yusuf's attorney. A short time later petitioner arrived and was placed under arrest. In transit to the FBI office, petitioner said to one of the agents, "It's the Israeli's, not the Jordanians that want me." Up to that point the FBI agents had not informed petitioner of their earlier mistake regarding the country requesting the warrant, but then confirmed that the petitioner was correct about which country sought his extradition.

As noted earlier, Article V of the extradition Treaty provides that "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, ... to justify his committal for trial...." The first crucial question here, then, is whether evidence introduced at the hearing is sufficient to support the magistrate's finding of probable cause.

[1] In this case we have the statement of Yasin, an accomplice, that petitioner planted the bomb in Tiberias. Although in this circuit we advise a jury to give accomplice testimony such weight as is felt it deserves and to consider it with caution and great care, accomplice testimony is nevertheless competent to support a finding of probable cause. Federal Criminal Jury Instructions, Seventh Circuit 1980, 3.22 Accomplice Testimony. Such evidence may be of particular importance in extradition cases where all the alleged criminal activity occurred in a distant country. In *Curreri v. Vice*, 77 F.2d 130, 132 (9th Cir. 1935), the court, in the context of an extradition proceeding, stated that "the testimony of an accomplice is, next to the confession of the defendant, the most satisfactory kind of evidence that can be produced as to the guilt of the defendant." An accomplice's accusations are not automatically incompetent to support a determination of probable cause, as petitioner would have it.[5]

[2] Yasin's statements inculpated both himself and petitioner in the commission of the bombing. Yasin's statements were admissions against his own penal interest and are deemed reliable. *United States v. Harris*, 403 U.S. 573, 583-84, 91 S.Ct. 2075, 2081, 29 L.Ed.2d 723 (1971); *United States v. Boyce*, 594 F.2d 1246, 1249 (9th Cir. 1979). The prejudice to Yasin in making the statement strengthens its supportive character.

[3, 4] Quite apart from the prejudice to Yasin and his knowledge of the events of the bombing and petitioner's departure, there are additional reasons for crediting the accomplice's statements. The statement of Captain Peretz corroborates Yasin's statements as to the cause, timing, place and occurrence of the explosion in Tiberias. Mufida Jaber's statement corroborates Yasin as to Yasin's communication to petitioner that they were in danger, and petitioner's subsequent departure to the United States. Where an accomplice's testimony is corroborated by further facts there is sufficient evidence to find probable cause. *United States v. Harris*, *supra*; *United States v. Boyce*, *supra*.[6]

5. The uncorroborated testimony of an accomplice has been held sufficient to support even the higher reasonable doubt standard necessary for a criminal conviction. *Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968) (testimony of accomplice sufficient even though inconsistent with only evidence connecting defendant with offense). *See United States v. Lee*, 506 F.2d 111 (D.C.Cir.1974) (conviction may rest solely on uncorroborated testimony of an accomplice); *United States v. Green*, 446 F.2d 1169 (5th Cir. 1971) (no absolute rule of law preventing convictions on the testimony of an accomplice).

6. The issue of corroboration generally arises in the context of search warrants; however, the same standards are applicable to the issuance of an arrest warrant. *See Giordenello v. Unit-*

[5] Furthermore, Yasin's statements are corroborated by the acts of petitioner himself. When first asked his identity by FBI agents, petitioner gave a false name, thereby concealing his identity and, at least temporarily, evading arrest. When subsequently apprehended, petitioner, unprompted, advised FBI agents that it was the Israelis rather than the Jordanians that issued the warrant for him. That petitioner concealed his identity and moved to a different address in Chicago permits an inference of his guilt. Flight also is a legitimate ground from which to infer guilt and here, at the least, lends itself to use as corroboration of Yasin's statement in the consideration of probable cause. *See Rowan v. United States*, 277 F. 777 (7th Cir. 1921) (evidence of flight admissible since its probative value is to indicate a consciousness of guilt); *Kanner v. United States*, 34 F.2d 863, 866 (7th Cir. 1929) (evidence of flight and assumption of false name admissible); *United States v. Dalhover*, 96 F.2d 355, 359 (7th Cir. 1938); *Currie v. Vice*, 77 F.2d 130, 133 (9th Cir. 1935); *United States v. Heitner*, 149 F.2d 105, 107 (2d Cir. 1945); *Green v. United States*, 259 F.2d 180, 182 (D.C.Cir. 1958). That petitioner likewise knew it was the Israelis who sought him also tends to support some inference of guilt. On these facts, the statements of Yasin, an accomplice, corroborated by statements of an investigating police officer and Yasin's cousin, Jaber, and by inferences that may be drawn from petitioner's own conduct of concealment and flight are sufficient to support the magistrate's finding of probable cause.

[6] Appellant contends that the magistrate erred by refusing to admit statements in which Yasin and Jaber allegedly recanted their earlier statements regarding petitioner's role in the bombing. We disagree. An accused in an extradition hearing has no right to contradict the demanding country's proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 F.2d 884 (1973). To do otherwise would convert the extradition into a full-scale trial, which it is not to be. "[T]he extradition proceeding is not a trial of the guilt or innocence [of petitioner] but of the character of a preliminary examination . . ." *Jimenez v. Aristeguieta*, 311 F.2d 547, 556 (5th Cir. 1962). The inculpatory statements of Yasin and Jaber were made before an Israeli police officer. The statements were transcribed in Hebrew and were subsequently sworn to be true and correct before an Arabic speaking judge of the Magistrate's Court of Jerusalem. The judge conversed with Yasin and Jaber in their native Arabic and determined that the witnesses understood their statements and that the statements were made of their own free will.[7] Petitioner's offer of proof, which was rejected by the magistrate, consists of declarations by Yasin and Jaber in which each recants prior detailed testimony implicating petitioner in the bombing. These declarations were made to private counsel while Yasin and Jaber were being held in prison. Both Yasin and Jaber declared that the inculpatory statements were made under the mistaken belief that petitioner could not be harmed by the statements because he was outside the country. The later statements do not explain the government's evidence, rather they tend to contradict or challenge the credibility of the facts implicating petitioner in the bombing. Therefore, the magistrate properly decided that such a contest should be resolved at trial in Israel.[8] The alleged recantations

ed States, 357 U.S. 480, 485-86, 78 S.Ct. 1245, 1249, 2 L.Ed.2d 1503 (1958).

7. We find no merit in petitioner's suggestion that the confessions were inherently suspect by virtue of being transcribed in Hebrew as opposed to the declarants' native Arabic. The magistrate considered this fact along with statements by Judge Shahtay of the Magistrate's Court of Jerusalem that he questioned Yasin and Jaber in Arabic and determined that they understood their statements and made them of their own free will.

8. Petitioner relies on *Application of D'Amico*, 185 F.Supp. 925 (S.D.N.Y.1960), for a rule that evidence that an accomplice has recanted his testimony is always admissible in an extradition proceeding because the probative value of such testimony is "thin." However, petition-

are matters to be considered at the trial, not the extradition hearing.

[7] Petitioner also challenges the magistrate's rejection of statements claiming that petitioner was in Ramallah on the day of the bombing. This evidence directly contradicts the government's proof that petitioner placed a bomb in a trash bin in Tiberias on the same day. "[E]vidence of alibi or of facts contradicting the demanding country's proof or of a defense such as insanity may properly be excluded from the Magistrate's hearing." *Shapiro v. Ferrandina*, 478 F.2d at 901 (1973). Thus, the magistrate in the case before us correctly refused to admit the evidence.[9] This evidence also is a matter for consideration at the trial, not the extradition hearing.

III. Treaty Construction

Because petitioner's remaining arguments implicate political concerns, it is essential that we explore the significance to extradition of crimes arising in a political context. Most treaties list categories of crimes or specific offenses for which extradition may be requested. There usually are, however, exceptions to the crimes contained in the list. Many treaties include "political crimes" among those exceptions. The traditional extradition treaty language that deals with the political context of crimes excepts from the treaty crimes that are "of a political character." The Treaty involved in this case uses the traditional language, and like most other similar treaties does not further define its terms.

Petitioner notes that courts around the world have recognized analytically separate kinds of political offenses, termed "pure" and "relative." A "pure" political offense is an "act that is directed against the state but which contains none of the elements of ordinary crime," such as sedition, treason and espionage. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Virginia L.Rev. 1226, 1230, 1237 (1962) (hereinafter cited as "Garcia-Mora"). A "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." *Id.* at 1230-31. Petitioner argues that he should not be extradited because the crime with which he is charged constitutes a relative political offense, and that the political overtones of the act outweigh the elements of common crime. The government, in addition to disputing petitioner's argument, urges this court to hold that the determination of the political nature of the crime is itself a political question which should be the sole responsibility of the "political branches" (i. e., Congress and the Executive)[10] to decide, not the Judicial branch. The government also contends that the Treaty itself places sole authority to make the determination of a "political offense" in the hands of the Executive. It therefore becomes necessary to interpret the meaning of the "political offense" exception.

er's characterization of the decision in *D'Amico* is inaccurate. In that case the evidence of recantation already had been admitted by the magistrate. The district court on habeas corpus review had no opportunity to consider whether or not the evidence of recanting was properly on the record, and therefore made no determination on the issue. The district court in *D'Amico* remanded the case to the magistrate because it was unclear whether or not the magistrate had made a specific determination on the issue of probable cause.

9. Petitioner also urges that reports alleging torture in Israeli prisons should have been admitted to explain the circumstances of Yasin's confession. Petitioner offered no proof that Yasin himself suffered any mistreatment. We are asked to take judicial notice that Israel routinely tortures prisoners, an invitation we decline. Judicial notice could be taken only of a matter not reasonably subject to dispute and which is generally known to the court, or otherwise is capable of accurate and ready determination by sources that cannot reasonably be questioned. *Cf.* Fed.R.Evid. 201 (judicial notice in contexts other than extradition). We note that the reports of various organizations which petitioner brings to our attention were not themselves all unanimous in their findings; some contain both majority and minority conclusions. No aspect of this situation lends itself to judicial notice. *See generally*, W. Hurst, Statutes In Court 89-96 (1970).

10. *See Chicago & Southern Airlines v. Waterman Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

A. Authority to Determine Extradition Issues as a Matter Within Sole Discretion of Political Branches

[8] The government's argument that the Political Branches should decide the question of whether the crime charged is a "political offense" under the Treaty has no basis in United States case precedent.[11] The government's contention, however, points up an apparent anomaly in the American law of extradition. It is the settled rule that it is within the Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i. e., whether the request is a subterfuge. *In re Lincoln*, 228 F. 70 (E.D.N.Y.1915), *aff'd per curiam*, 241 U.S. 651, 36 S.Ct. 721, 60 L.Ed. 1222 (1916); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962). In contrast, the Judicial branch has consistently determined whether or not the "political offense" provision applies to the crime charged, presumably relying upon the language in 18 U.S.C. § 3184. That section requires a hearing to determine whether there is sufficient evidence "to sustain the charge under the provisions of the proper treaty." (Emphasis supplied.)[12] We have not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented. If anything, one of the major criticisms leveled at American extradition law is that federal courts have tended to invoke the political acts exception in situations of common crimes mixed with political overtones upon a showing of "any connection, however feeble" to an uprising or rebellion or condition of domestic violence. *See* Garcia-Mora at 1244; I. A. Shearer, Extradition In International Law 171 (1971) (hereinafter referred to as "Shearer").

[9] Congress originally made the determination that it is for the courts to decide how to apply the exception by making it a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime "under the provisions of" a treaty. The Executive branch has, over the years, implicitly endorsed this approach.[13] The present system of American extradition perhaps may have evolved as a way of providing the Executive some flexibility in decision-making by allowing it to defer to the Judiciary's decision, for example, to refuse extradition of an individual who the Secretary of State is reluctant to extradite anyway. This "permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations." Lubet & Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J.Crim.L. & Criminology 193, 200 (1980) (hereinafter cited as "Lubet & Czaczkes"). *See* Shearer at 192; Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L. J. 71, 74 (1978). With this background in mind, we consider whether the issues involved in applying the political offense ex-

11. The only case with any similarity which we have found that permits the Executive to make the initial determination in extradition matters that the crime charged was committed and that the person sought to be extradited committed it, *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969), involved a treaty that implicated the "special relationship between the Canal Zone and the Republic of Panama." *Id.* at 686. The court indicated, however, that any Executive determination to extradite still would be subject to review on habeas corpus.

12. A clause excepting political offenses is a "provision" of the treaty. *See generally* cases cited in Note, 62 Colum.L.Rev. at 1322, nn. 73, 74. *Compare Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925) (habeas corpus available to determine "whether the offense charged is within the treaty").

13. Prior to the enactment of the original version of 18 U.S.C. § 3184, the Executive exercised complete control over extradition without reference to the courts. Bassiouni at 505. Thus, from 1794 to 1842 the Executive had unfettered discretion in this area. Immediately upon the statute's enactment, the Executive began a policy of deference to the role of the Judiciary as mandated by Congress. *See* 4 Op. Att'y Gen. 201 (1843).

ception are such that only the Executive should make the determination.

The government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue which, the government says, does not lend itself to judicial application. *See* L. Tribe, American Constitutional Law 75 (1978) (hereinafter referred to as "Tribe"). Instead, the government emphasizes the constitutional commitment of foreign policy and international affairs decisions generally to the Executive, and suggests that the political nature of those areas renders them unsuitable for judicial consideration. But, as the Supreme Court has said, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence." *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962). This court must decide whether the present case contains elements of foreign policy that do lie beyond judicial competence, and if so, whether that justifies a rule that precludes judicial consideration of similar treaty provisions in all cases.

We disagree with the government's argument relying on *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710, that construing application of a treaty's political offense exception clause requires "an initial policy determination of a kind clearly for nonjudicial discretion." It is clear that courts have authority to construe treaties. *See* Tribe at 76, n. 35. In the absence of an Executive determination that a treaty has been terminated, a court may consider the issues raised when it is asked to apply the treaty: the Court "can construe [the] treaty and may find it provides the answer." *Baker v. Carr*, 369 U.S. at 212, 82 S.Ct. at 707. *See* J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 104 (1978); L. Henkin, Foreign Affairs And The Constitution 210–16 (1972).

[10] The government stresses the unique resources available to the Executive to aid its determination of the political situation in foreign lands. But the State Department can and has made it a practice to share that information with courts during extradition proceedings. *Cf.* Baldwin, *The Foreign Affairs Advice Privilege*, 1976 Wisconsin L.Rev. 16 (Secretary of State may withhold certain foreign affairs information from Congress). In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.[14] The resources to make

14. This distinguishes the cases cited by the government that confer sole discretion on the Executive to determine when a state of war or belligerency exists in another country. *In re Cooper*, 143 U.S. 472, 12 S.Ct. 453, 36 L.Ed. 232 (1892); *The Three Friends*, 166 U.S. 1, 17 S.Ct. 495, 41 L.Ed. 897 (1897); *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). In those situations a court would be unable definitively to say that a specific level of hostility had been reached. When considering the political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level.

We note especially the following language from *In re Cooper*:

> We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

143 U.S. at 503, 12 S.Ct. at 460 (emphasis supplied). The question, then, is not so settled as the government suggests, since there is no extradition statute specifically authorizing the Executive to make the determination whether the political offense exception applies, nor is there a statute defining the term.

We also note that *The Three Friends* case makes specific mention of the numerous legal consequences of declaring a "state of belligerency," which include impacts on the conduct of commerce and even the war power, 166 U.S. at 63, 17 S.Ct. at 502. We emphasize that there has been no showing that such broad legal consequences would obtain in the case before

that initial determination can ordinarily be sufficiently produced for judicial consideration. *In camera* review is available for sensitive evidence. In this case an assistant legal advisor for the State Department's Office of Combating Terrorism, an authorized spokesman for the Department, did appear and testify. Mr. Fields explained that "It is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable in both states." There was additional evidence offered by the Department of State concerning the positions consistently taken by our high government officials in regard to terrorism. The official Executive view was made known to the magistrate. Even though we do not leave sole determination to the Executive branch, we believe its views are entitled to great weight in extradition matters.

The government also expresses concern over the possibility that a court's pronouncements on certain subjects may conflict with the Executive's and embarrass this country's conduct of its foreign policy. In particular, the government points to petitioner's claim that in order to consider the political aspects of his alleged actions a court must "recognize" the PLO as a legitimate political group, a position the United States has not taken. We agree with the government when it says "[t]hat decision should only be made by those directly responsible for overseeing our foreign relations." However, the formulation of the political offense exception does not require any such "recognition." It requires only the recognition that there occurred violent acts and political tensions that resulted in the charged criminal acts. That determination does not give rise to a direct conflict: in most cases there is no real contention about the existence *vel non* of political violence in the requesting country.

The government's concerns seem directed to whether the Judiciary will recognize a given sort of violence as falling within the protection of the political offense exception, thus implicitly conferring on certain actions a status with which the Executive might disagree. We point out that the Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable "political question." [15] To some extent, "all constitutional interpretations have political consequences," R. Jackson, The Supreme Court In The American System 56 (1955), and indeed the same follows from any treaty interpretation. We recognize the need for special sensitivity in areas such as our government's foreign relations conduct, but that sensitivity does not preclude the Judiciary from having a part in the process of determining whether the political offense exception applies. That determination involves an approach to factfinding that is traditional to the courts.

[11] We also disagree with the government's argument that there are no judicially discoverable and manageable standards to guide the court's discretion. For better or worse, the extradition statute requires the magistrate to determine that the crime alleged is listed in the applicable treaty, and that the provision of the treaty relating to political offenses does or does not apply. Before an act may constitute a political offense, there must be two basic determina-

us upon a finding that political upheaval is occurring in Israel.

15. We also note that the Judiciary has made numerous decisions that touch our nation's domestic and foreign policy concerns and implicate matters that traditionally are thought of as Executive functions—on occasion to the chagrin of the latter branch. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (permitting publication of Pentagon Papers in face of argument of threat to relations with allies); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (restricting Executive discretion against claim of necessity to further International military policy). *See also Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (appraisal of International tensions and conditions in evaluating constitutionality of statute).

tions made by the magistrate: that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance. The magistrate's *legal* determination that a person is extraditable does not bind or control the Secretary's later *political* conclusion. *In re Ezeta*, 62 F. 972 (N.D.Cal.1894). On the other hand, if the magistrate concludes that the individual is not extraditable, it is up to the Secretary to decide whether or not to pursue the issue before another magistrate, as in *In re Gonzalez*, 217 F.Supp. 717 (S.D.N.Y.1963). The Secretary, it appears, contrary to general practice, has been permitted to shop for a more receptive magistrate.

In order to assure that there is adequate protection of the rights of an individual whose extradition is requested, "[p]urely as a practical matter it would seem reasonable for the courts of this country to make an initial finding of extraditability of particular offenses." *Shapiro* v. *Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973). As Judge Friendly stated in the *Shapiro* case, "we see little reason why a prior judicial determination would be viewed by [the Secretary of State] as an unwarranted intrusion upon executive power." *Ibid.* See Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 584 (1966) (courts are cautious about invoking political question doctrine where important individual rights are at stake). *Cf.* Kutner, *World Habeas Corpus and International Extradition*, 41 U.Toledo L.J. 525, 532 (1964) (Secretary of State's power of ultimate determination not to extradite, despite court certification, shows latitude democracy allows in concern for individual rights).

The government stresses that courts have refused to look at the requesting country's motives to determine if extradition for a common crime is sought merely as a subterfuge for trying an individual for political crimes, *see Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), even in the presence of an express provision of the treaty, such as the one in the Treaty before us. This raises the logical question of why the Executive's authority is "virtually untrammelled" [16] in that area, but is subject to an initial decision by the Judiciary on the applicability of the political offense exception.

The different approaches taken on political offense and "subterfuge" issues are not so anomalous as the government suggests. In considering the presence of a political offense, the court determines whether the crime charged stemmed from political violence. To make that determination, the magistrate need look only to the facts supporting the extradition request for evidence as to whether or not violent political activity was unfolding at the time to which the facts relate, and of the individual's recognizable connection to that violence. Compared to that, evaluations of the motivation behind a request for extradition so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion. The Executive's evaluation would look at the actual operation of a government with which this country has on-going, formal relations evidenced by the extradition treaty and imply that the government may be disingenuous. This obviously would be an embarrassing conflict over assumptions essential to our foreign relations about the integrity of governments with which the United States deals. A judicial decision, however, that establishes an American position on the honesty and integrity of a requesting foreign government is distinguishable from a judicial determination that certain events occurred and that specific acts of an individual were or were not connected to those events. The latter type of decision simply categorizes the facts involved in a given case and then construes the treaty to determine whether or not the facts fall within its ambit. Thus, the Judiciary's deference to the Executive on the "subterfuge" question is appropriate since political questions

16. Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962).

would permeate any judgment on the motivation of a foreign government.[17]

It should be emphasized, however, that the government's argument on this point is not without some merit. If our long established extradition process is thought to need some overhauling, it is for the Congress to consider, not the courts.

B. Treaty Language: Discretion to Determine Political Nature of Offense Within Sole Discretion of Executive Branch

[12] The government argues that the Treaty, by its own terms, leaves to the sole discretion of the Executive branch the determination whether or not an alleged act for which extradition is sought is of a political nature. In support of its argument, the government cites the text of the Treaty: "Extradition shall not be granted ... When the Offense is regarded *by the requested Party* as one of a political character...." Art. VI, par. 4 (emphasis added). The government contends that the words "requested Party" refer only to the Executive branch, citing *Berenguer v. Vance*, 473 F.Supp. 1195 (D.D.C.1979). We conclude that the *Berenguer* case is inapposite and that the government's contention lacks sufficient merit to justify a holding in its favor on this issue.

In *Berenguer*, Italy had obtained Berenguer's extradition from the United States through normal channels for trial on certain defined crimes. Once Berenguer was in Italy, that country asked the State Department to expand the list of charges for which he could be tried. This request was necessary because a principle of international law known as the "doctrine of specialty," which was explicitly incorporated in the treaty, states that the requesting country must seek permission of the "requested Party" before prosecuting or punishing an extradited party for any offense committed prior to extradition, except that for which he was extradited. Berenguer claimed that the State Department could not acquiesce to an extension of the original charges absent a new hearing before an American magistrate. The district court disagreed, noting that once Berenguer was lawfully extradited and had arrived in Italy he was no longer subject to the jurisdiction of United States courts and his American due process rights no longer controlled his case. 473 F.Supp. at 1198. Expansion of the list of crimes for which he could be tried became a matter of state to be decided by the Executive branches of the two nations. That court also noted that the language of the treaty did not specify a procedure to guide the decision on expanding the list of crimes for which Berenguer could be tried. Thus, the district judge held that the decision was left to the State Department. To that limited extent, the government is correct when it argues that the district court in *Berenguer* held that the term "requested Party" refers to the Executive branch, since there was an absence of statutory or treaty language "requiring a second judicial hearing once extradition has been accomplished." *Id.* at 1197. But the court in *Berenguer* explicitly noted that *before* extradition is accomplished, there must be a hearing before a magistrate to determine whether there is probable cause to believe the person committed a crime for which he could be extradited under the terms of the treaty. *Id.* at 1196.[18] The district court's

17. *Compare* the "Act of State" concept, which says that "the courts of one nation will not sit in judgment on the acts of the government of another done within [the latter's] own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed.2d 456 (1897).

18. *Compare Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978), where the court says the extradition hearing is limited, *inter alia*, "merely to ascertain whether a treaty applies ..." The government cites both the *Sabatier* and *Berenguer* opinions in support of the argument that the courts may only make a determination on the issue of probable cause, which in the government's view excludes judicial application of the political offense exception. As we discuss in an earlier part of this opinion, it has been the law of extradition in this country that the probable cause hearing comprehends a determination that the crime charged is one "under the provisions of" the treaty (*i. e.*, that it is not a political offense). 18 U.S.C. § 3184. While the portion of the *Sabatier* opinion quoted in this footnote, if read alone, may be construed to support the govern-

careful distinction in that case between extradition decisions made before and after actual extradition counsels against our expanding the *Berenguer* holding to read the term "requested Party" in extradition treaties as always referring solely to the Executive branch.

As the district court stated in *Berenguer*, one constant in American extradition law is that the magistrate is to make the initial determination in the extradition process. We hesitate to hold on so slim a record as is available on the intent of the drafters of the Treaty in this case that the major "procedural safeguards established to protect the defendant's rights" in extradition, *id.* at 1198, have been deliberately written out of the document, although the treaty language lends some support to that interpretation. Our caution is reinforced when we note that the only case we have found that holds the Executive branch entitled to make the initial extradition decision subject only to later habeas corpus review, *Sayne v. Shipley*, supra n.11, did so in the narrow context of an extradition treaty arising from the "special relationship between the Canal Zone and the Republic of Panama." 418 F.2d at 686. No similar "special relationship" exists between the countries who are parties to the Treaty before us.

C. Extradition Request as a Subterfuge

[13] Petitioner claims that Israel seeks his extradition on charges of common crimes in order to try him for his political beliefs. Thus, he says, he should not be extradited, even though all proceedings in Israel concerning this case have been conducted in civil, not military, court.

The determination in this case whether or not the request for extradition on common crimes amounts to a subterfuge by Israel to punish petitioner for a political offense is, as we have clearly noted, a decision within the sole province of the Secretary of State. *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932); *In re Lincoln*, 288 F. 70 (E.D.N.Y.1915), *aff'd per curiam*, 241 U.S. 651, 36 S.Ct. 721, 60 L.Ed. 1222 (1916); *Sindona v. Grant*, 461 F.Supp. 199 (S.D.N.Y.1978). As should be clear from our earlier discussion, petitioner's claim is without merit, since this court has no jurisdiction to determine the requesting country's motives under this Treaty.

IV. Political Offense Exception

[14] The operative definition of "political offenses" under extradition treaties as construed by the United States limits such offenses to acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. Shearer at 178–81; Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 Marquette L.Rev. 777, 795–97 (1977) (hereinafter referred to as "Cantrell"); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, — U.S. —, 101 S.Ct. 612, 66 L.Ed.2d 497; *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959); *In re Ezeta*, 62 F. 972 (N.D.Cal.1894). Petitioner argues that it is apparent that the crime with which he is charged is a political offense because there was and is a conflict in Israel that involves violence, and the PLO, to which petitioner allegedly belongs, is a party to that violence.

ment's view, when read in context of that opinion and of general principles governing extradition, it suggests quite a different view. At the outset of the opinion, 586 F.Supp. at 868, the court quotes the Supreme Court in *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925), for the proposition that the magistrate is to determine "whether the offense charged is within the treaty," language which tracks that of § 3184 both in form and meaning. Since the *Sabatier* court was not presented with an issue implicating an exception to the treaty, it is hardly surprising that later in the opinion the court did not specifically refer to broader duties of the magistrate during the extradition hearing. The same appears to be true in *United States v. Clark*, 470 F.Supp. 976 (D.C.Vt.1979), which cites *Sabatier* for the more narrow definition of "its role in this proceeding." *Id.* at 978. The *Sabatier* and *Clark* opinions merely re-state the statutory framework that leaves to the Judiciary the initial determination whether the political offense exception applies.

Petitioner notes that generally the motivation of the individual in committing the alleged crime is not an issue in the extradition proceeding. Lubet & Czaczkes at 203. "[T]he nature of the offense does not depend on the motives of the actor just as [the] nature of the offense may not confer upon the actor certain motives that were not present at the commission of the violation." Bassiouni at 378. However, petitioner maintains "that American courts will seize upon the slightest connection between the crime and political act or objective in order to find a political offense." Cantrell at 795. Thus, petitioner asserts that he cannot be extradited because Israel's allegation of his membership in the PLO is enough to bring his alleged role in the bombing within the scope of the political offense exception. Petitioner's characterization of the American law of extradition is facially plausible. But, like most generalizations about complex legal areas, there is much detail that petitioner's position fails to take into account.

The United States law of extradition has been severely criticized for not having progressed from its origins in nineteenth century British law. *See*, e. *g.*, Shearer at 181. In particular, it has been asserted that the "narrow interpretation" of the political offense exception which rejects consideration of the motivations behind an alleged crime "may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising.... [T]he overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder." Lubet & Czaczkes at 203, 204. Such a narrow approach "can result in grave abuse" of treaty exceptions for political offenses. Cantrell at 795. While we keep these concerns in mind, we conclude that existing law is sufficiently flexible to avoid such abuses.

The weakness of the approach attributed to American courts is apparent in the case before us. Petitioner consistently has tried to establish that there exists in Israel a state of conflict in the nature of a war, revolution or rebellion. This, he contends, establishes the propriety of using the political offense exception in this case. The magistrate refused to take judicial notice of the existence of a state of political and military conflict between Israel, its neighboring states and national liberation movements in the Middle East. The magistrate did, however, receive evidence on "the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel ... as well as the 1967 occupation by Israel of the West Bank of the country of Jordan...." *In re Abu Eain*, No. 79 M 175 (N.D.Ill. Dec. 18, 1979) (Mem.) at 14. It appears that the magistrate may have assumed that a conflict existed at the time of petitioner's alleged acts since her subsequent discussion on the applicability of the political offense exception went mainly to issues that usually are considered only after a determination of a violent political disturbance has been made.

There remains, however, some question as to whether that finding of a "conflict" is sufficient to establish that there exists in Israel "a violent political disturbance, such as a war, revolution or rebellion." The nature of that conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception has been sustained. Those cases involved on-going, organized battles between contending armies, a situation which, given the dispersed nature of the PLO, may be distinguished. *See*, e. *g.*, *Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959) (members of organized revolutionary army with established chain of command operating within the country); *United States v. Artukovic*, 170 F.Supp. 393 (S.D.Cal.1959) (military government installed by Nazis during World War II; discussed in dictum). Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction

with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An ongoing, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof than otherwise may be involved. *See generally* Lubet & Czaczkes at 206, 208–10.

For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country,[19] and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.

[15] The magistrate, however, understood that the finding of violent upheaval at the time an allegedly political crime occurred was not the end of the analysis under the political offense exception. She went further and found that petitioner had failed to establish that the bombing was incidental to the PLO's objectives. The magistrate held that simply noting membership in the PLO, but not tying the membership to the specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception. Absent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may be reasonably "incidental to" a political disturbance. Because the bombing was not shown to be incidental to the conflict in Israel, the magistrate held that it was therefore not an act covered within the political offense exception. We agree with her conclusion.

[16, 17] The reason that the bombing was not "incidental to" the conflict does not lie in the motivation for the act, since, for purposes of extradition, motivation is not itself determinative of the political character of any given act. Lubet & Czaczkes at 203 n.102. The definition of "political disturbance," with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the

19. *See* "Covenant Against Israel," adopted by the Palestinian National Council in 1968 and discussed by one of petitioner's witnesses during the hearing before the magistrate. The document asserts that "Palestine" is the rightful homeland solely for "Palestinians." Article 6 of the Covenant then states that "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians." A reading of the testimony of that witness, who was produced as petitioner's expert in this area, indicates that the document would mark the "Zionist invasion" as beginning in 1917 or 1922. Jews who arrived in Israel after those years would be unwelcome in the Palestinian state. Because they comprise the bulk of the present-day Israeli Jewish population, they are the targeted group of the "armed struggle" (Covenant, Artlcle 9) that the PLO wages.

government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval. A result we think the political offense exception was not meant to produce.

[18] This policy long has been articulated in extradition cases of this and other nations in the context of terrorist activities, particularly those of anarchists. Although distinguishable in some respects, the case of *In re Meunier* [1894] 2 Q.B. 415, provides the earliest illustration of the principle under British law, from which the American law of extradition developed. France had requested the extradition of Meunier from England where he had traveled after allegedly bombing a cafe and army barracks in the cause of anarchy. In granting France's extradition request, the divisional court on habeas corpus discounted Meunier's claim that his activities aimed at terrorizing an entire population in order to subvert a government through social disorder fell within the political offense exception. The court first noted that the anarchist movement did not represent a party, in the usual sense of the term, "seeking to impose the Government of their own choice on the other [party]," 2 Q.B. at 419, a prerequisite for invoking the exception. Rather, the aim of the anarchists was to topple the formal political structure by destroying its supporting social fabric.[20] The anarchist's efforts were not directed at the government, but instead were "directed primarily against the separate body of citizens," *id.*, a form of political expression not protected under the political offense exception. As recent commentators have stated, "an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception." Lubet & Czaczkes at 202. *See* Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J.Int'l Law & Econ. 475, 501 (1975) quoting U. N. Secretariat study: "[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent").[21]

Anarchy presents the extreme situation of violent political activity directed at civilians and serves to highlight the considerations appropriate for this country's judiciary in construing the requirements of our extradition laws and treaties. But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates anarchist-like activity, i. e., the destruction of a political system by undermining the social foundation of the government. The record in this case does not

20. We acknowledge that it may not be "textbook" political science and sociology to distinguish between disagreement with a government and with the society that establishes it. Nevertheless, as a practical matter it must be recognized that within every society there will be elements who are dissatisfied with their government. At times this dissatisfaction may be expressed, deliberately or by reason of an uncontrollable flare of temper, in violent acts that have an impact on private social interests. We do not have occasion in this case to consider the boundaries within which the political offense exception operates in these situations. We are concerned here only with a violent act focused at the *social* structure.

21. *Cf.* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 82 (1978), discussing the Swiss concepts of "predominance" and "proportionality": "The criminal action must be 'immediately connected with its political object,' and the damage caused must not be out of proportion to the desired result." The parties did not argue the direct application of these concepts to American extradition law. While proportionality and predominance may be unarticulated concepts in the existing Anglo-American framework of extradition, we leave consideration of that question for another time.

indicate that petitioner's alleged acts were anarchist-inspired. Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as petitioner insists, to certain aspects of the PLO's strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like *In re Meunier*, as to be almost indistinguishable.

We have found no American cases that detract in any way from the applicability of the *Meunier* theory to the case before us. The case that comes closest to challenging *Meunier*'s applicability is dictum contained in *United States* v. *Artukovic*, 170 F.Supp. 383 (S.D.Cal.1959), one of the most roundly criticized cases in the history of American extradition jurisprudence. *See, e. g.*, Lubet & Czaczkes at 206–07; Garcia-Mora at 1246–47; Cantrell at 795–96. In *Artukovic*, the magistrate commented in dictum that he believed murders of civilians were political offenses when carried out pursuant to the orders of a Croatian government official who was serving at the time with the blessing of the Axis powers in World War II. Against the backdrop of confused and rapid shifts of wartime government, the magistrate felt, killings accomplished by various militia protecting each successive government constituted political acts. 170 F.Supp. at 392–93. The magistrate noted that orders for the killings were aimed at specific racial groups denominated "enemies" of the Croatian government, not at the general population. *Id.* at 390.

The reasoning in the *Artukovic* case (which of course is not binding precedent for this court) can be distinguished from the facts before us, since the acts constituting Artukovic's alleged offenses were carried out by a government in power, which was at least nominally seeking to eliminate its political "enemies." In the present case, the bombers could not discriminate between their victims. We note that the *Artukovic* court's dictum could not be challenged by the United States government on appeal, since the initial decision in extradition cases effectively terminates proceedings upon a finding that a person is not extraditable. And the actual holding in the case was that Artukovic could not be extradited since the government failed to show probable cause that he committed the crimes. We also note that the country which sought Artukovic's extradition had obtained a United States Supreme Court order vacating earlier judgments that found the political offense exception applicable to the case. *Karadzole v. Artukovic*, 355 U.S. 393, 78 S.Ct. 381, 2 L.Ed.2d 356 (1958).[22]

Other cases more sharply demonstrate the difference between the usual application of the political offense exception and the situation before us here. For example, the more usual situation occurred in *Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959). The district judge conducting the initial extradition hearing pursuant to 18 U.S.C. § 3184 found that the killing of a political prisoner by two members of Castro's revolutionary army in Cuba (who had left that country after the revolution) was a political offense preventing extradition of the alleged killers upon request from Communist Cuba. The district judge noted that the victim was "one of many political prisoners captured in furtherance of the political uprising. The Defendants were under the command of the revolutionary forces engaged in mopping up operations as part of the revolution." 179 F.Supp. at 459. The situation thus was unlike petitioner's alleged actions in the present case, where the killings were done, so far as we can tell from the present record, without regard for political affiliation or governmental or military status of the victims.[23]

22. *See* 170 F.Supp. at 383–86 for a full account of the *Artukovic* case's convoluted progress through the judicial system.

23. As a collateral matter, petitioner claims there is no evidence that those who were killed and injured in the Tiberias bombing were civilians, and thus argues that discussion of their civilian status is inappropriate at all levels of this case. It should be pointed out that our discussion revolves around the population to which the violent act was directed. The fact that the explosive was placed on a busy public street during a public holiday in a resort city

We note that even in the nineteenth century the United States Supreme Court indicated that the civilian status of victims is of significance when courts consider the political offense exception. In *Ornelas v. Ruiz*, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1896), the Court upheld a magistrate's determination that a raid on a Mexican village and its military garrison by more than a hundred men was not incidental to violent political disturbances that were occurring in Mexico at the time, as the raiders had claimed. The Court felt that the magistrate was justified in refusing to apply the political offense exception, "in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed." 161 U.S. at 511, 16 S.Ct. at 693. The applicability of *Ruiz* to the present case is even more compelling when one notes that the raiders were later tried in Mexico for their participation in the revolution they claimed the raid had furthered. 4 G. Hackworth, Digest of International Law, § 316, pp. 50–51 (1942). It is apparent that the Supreme Court viewed the raid as the sort of political activity that is not encompassed within the political offense exception, especially when the tie to a larger political cause was ambiguous in that specific instance.[24]

We likewise conclude that the magistrate in this case was correct in holding that the alleged bombing directed at a civilian population was not incidental to political upheaval, however characterized, which was occurring at the time in Israel. Petitioner may not claim the benefit of the political offense exception clause contained in Article VI of the United States extradition Treaty with Israel.

CONCLUSION

We affirm the district court's conclusion that the magistrate was correct under the established law of this country in finding probable cause to believe petitioner guilty of the crime charged for which he could be extradited to Israel. However, the determination of whether the petitioner is actually guilty or not requires consideration of all the evidence at a trial within the jurisdiction where the act is alleged to have been committed. That is not for our courts to determine within the limitations of a probable cause hearing. We therefore uphold the magistrate's certification to the Secretary of State and the commitment of

and that it is alleged petitioner said he would avoid all contact with the Israeli military makes it clear that the explosion was meant to snare civilian victims. In any event those killed were children. There is nothing in the record to suggest the possibility of any Israeli military involvement in any way.

24. The extradition treaty involved in *Ornelas v. Ruiz* apparently excepted crimes of a "purely political" character from its scope. It might be argued that the Supreme Court simply was distinguishing "pure" political offenses (treason, sedition and espionage), which never are extraditable, see Lubet & Czaczkes at 200, from situations where a petitioner claims he is accused of committing "relative" political crimes (common crimes with political overtones), which may not be extraditable, but which pose more difficult problems of proof. However, American courts "read the political offense exception broadly enough to bring in relative offenses," Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 82 (1978), and the Supreme Court's discussion in *Ruiz* of the acts constituting the alleged crimes leaves no doubt that the specific treaty language made no difference to the political offense analysis: relative political crimes fell within the exception for "purely political" crimes. Otherwise, the Court need not have reviewed at length the specific acts alleged. A "pure" political offense exception clause, had it made any difference to the analysis, would have been determinative without further discussion.

At any rate, the only support we have found for a substantive distinction in American law between "pure" and "relative" political offenses under specific treaty language is contained in Garcia-Mora, 48 Virginia L.Rev. at 1232. However, Garcia-Mora goes on to cite an American treaty with language identical to that involved in this case, and says the language applies to except from extradition only pure political crimes. If Garcia-Mora is correct, then petitioner automatically is extraditable, since no one argues here that the acts of which he is accused constitute pure political offenses. The point was not argued in this case.

petitioner to jail [25] until he may be surrendered to Israel upon a warrant issuing from the proper authorities of that country's government.[26,27]

Affirmed.

PITTWAY CORPORATION,
Plaintiff-Appellee,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant-Appellant.

No. 80-1408.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 4, 1980.

Decided Feb. 23, 1981.

Rehearing Denied April 13, 1981.

Aircraft owner brought action against aircraft manufacturer to recover for cost of repair incurred as result of cracked mainframe in its aircraft and for economic loss resulting from inability to use the aircraft during period when it was being repaired. The United States District Court for the Northern District of Illinois, Eastern Division, George N. Leighton, J., held that the case was governed by Wisconsin law and entered judgment on jury verdict awarding damages to plaintiff, and defendant appealed. The Court of Appeals, Cummings, Circuit Judge, held that even though the defect was discovered in Wisconsin, Illinois law applied because Illinois had a more significant relationship with the litigation, and thus plaintiff could not recover economic damages.

Reversed.

1. Federal Courts ⇐409

In a diversity case, governing choice-of-law principles are those of forum state.

2. Torts ⇐2

To determine applicable law in diversity tort action under Illinois law, there is presumption that local law of state where injury occurred governs rights and liabilities of the parties unless another state has a more significant relationship to the occurrence or parties involved.

3. Torts ⇐2

In determining, for purposes of choice of law in a diversity case, whether another state has a more significant relationship with the litigation than does place of injury, contacts to be considered include place where conduct causing injury occurred; domicile, residence, nationality, place of incorporation and place of business of the parties; and place where relationship, if any, between the parties is centered.

4. Torts ⇐2

For purposes of determining choice of law in diversity cases, relative importance of all alleged contacts, including place of injury, must be independently evaluated on a case-by-case basis with respect to particu-

25. On January 19, 1981, petitioner filed in this court a motion entitled "Emergency Petition to Rule on Appellate Motion to Reconsider Bail." Petitioner has made previous applications for bail. The present motion, which reveals no emergency, but alleges substantial security for bail and reargues the merits of the case, is now moot.

26. The Secretary of State has two months from the date of commitment following final judicial action in this case to surrender petitioner to the proper Israeli authorities if the Secretary in his discretion determines that surrender is appropriate. 18 U.S.C. § 3188; *Jimenez v. U. S. Dist. Court for Southern Dist. of Florida*, 84 S.Ct. 14, 11 L.Ed.2d 30 (1963) (Goldberg, J., in chambers). The final decision of whether petitioner is ultimately to be surrendered or not lies with the Secretary and not with this court.

27. Our holding in this case is not intended in any way to reflect a view one way or the other as to the merits or equities of any social or political problems existing between Israel and other parties. Those judgments are clearly far outside judicial bounds.

constitutes error in Louisiana.[40] We conclude that it does not. In *Guerra v. Young Construction Co.*, 165 So.2d 882 (La.App.), *writ ref'd*, 246 La. 864, 167 So.2d 676 (1964), the court held that a refusal to give a similar instruction was not error.[41] The defendants mistakenly contend that *DeBose v. Trapani*, 295 So.2d 72 (La.App.), *writ ref'd*, 299 So.2d 359 (La. 1974), repudiated the holding of *Guerra*. *See also Francis v. Government Employers Insurance Co.*, 376 So.2d 609 (La.App. 1979), *writ ref'd*, 378 So.2d 1391 (La. 1980). In *DeBose* the trial court had in fact *given* the requested instruction; the appellate court merely held that the trial judge had not erred in doing so. 295 So.2d at 74–75. *Cf. Francis*, 376 So.2d at 612 (following *DeBose*). The court in *DeBose* was simply not confronted with the issue presented in *Guerra* and in the instant case. In the absence of contrary authority,[42] we follow the mandate of *Guerra* in upholding the district court's refusal to give the instruction.

Conclusion

For the reasons stated above, we affirm the district court's imposition of joint and several liability on Mustang and Roberts Airways for plaintiffs' damages, as modified herein.

AFFIRMED in part and REVERSED in part.

40. Whether giving the instruction is desirable as a matter of policy is not the question before us; we need decide only whether the *refusal* to instruct requires us to reverse and remand this case for a new trial.

41. Charge No. 5 sought to instruct the jury not to add any amount to the actual damages any sum designed to offset income tax on the recovery, since the recovery is nontaxable. The judge instructed the jury properly as to the compensatory nature of damages, and specifically listed nine items which the jury might consider. Refusal to give the charge requested by defendants was not error. *See* 15 Am.Jur. Damages Sec. 369. *Id.* at 887.

42. *Reeves v. La. & Ark. Ry. Co.*, 304 So.2d 370 (La.App.), *writ ref'd*, 305 So.2d 123 (La. 1974), did not involve jury instructions and is not apposite here.

Gaspar Eugenio Jimenez ESCOBEDO, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

Gustavo CASTILLO, Petitioner-Appellant,

v.

Donald D. FORSHT, U. S. Marshal, Respondent-Appellee.

Nos. 79-1480, 79-1490.

United States Court of Appeals, Fifth Circuit.

Aug. 14, 1980.

United States citizens appealed from orders of the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denying their requests for habeas corpus relief by which they sought to block their extradition to Mexico for prosecution on charges of murder, attempted murder, and attempted kidnapping. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) evidence established probable cause to believe that the United States citizens committed the crimes charged; (2) although Mexican extradition documents establishing probable cause may not have constituted depositions in the strictly legal sense, they were sufficient to satisfy provision of United States—Mexico Extradition Treaty requiring depositions to accompany warrants for arrest; (3) United States citizens were not entitled to haveas under provision of the Treaty barring extradition for crimes of a purely political character; (4) discretion given executive to

extradite United States nationals did not violate due process; and (5) question whether United States should refuse to extradite its citizens because of Mexico's failure to extradite its nationals was one for the Executive Branch, not the courts, to decide.

Affirmed.

1. Habeas Corpus ⇐92(2)

Habeas corpus review of magistrate's extradition order is limited to determining whether the magistrate had jurisdiction, whether the offense charged was within the extradition treaty, and whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty. Treaty between United States and Mexico, Art. i et seq., 31 Stat. 1818.

2. Habeas Corpus ⇐92(2)

In reviewing finding of probable cause in magistrate's extradition order, function of Court of Appeals is to determine whether there is any competent evidence tending to show probable cause; the weight and sufficiency of such evidence is for the determination of the committing court.

3. Extradition and Detainers ⇐39

Hearsay evidence is permitted in extradition proceedings.

4. Habeas Corpus ⇐92(2)

Credibility of reported identification of fugitive is a matter committed to magistrate in extradition proceedings and is not reviewable on babeas corpus.

5. Extradition and Detainers ⇐14(2)

In proceeding to extradite United States citizens to Mexico for prosecution on charges of murder, attempted murder, and attempting kidnapping, evidence established probable cause to believe that the United States citizens had committed the crimes charged. Treaty between United States and Mexico, Art. i et seq., 31 Stat. 1818.

6. Extradition and Detainers ⇐14(2)

State law does not control reception of evidence at extradition hearings.

7. Extradition and Detainers ⇐14(2)

Mexican extradition documents, which were properly certified by United States Ambassador to Mexico, were authenticated and admissible at hearing to extradite United States citizen to Mexico for prosecution on charges of murder, attempted murder and attempted kidnapping. 18 U.S.C.A. § 3190.

8. Extradition and Detainers ⇐14(2)

United States citizens failed to impeach accuracy of trsnslation of Mexican extradition documents, but, even if their interpretation of the documents were accepted, the documents still supported the presence of probable cause.

9. Extradition and Detainers ⇐14(2)

Although properly authenticated Mexican extradition documents establishing probable cause may not have constituted depositions in the strictly legal sense, such documents were sufficient to satisfy provision of Extradition Treaty requiring depositions to accompany warrants for arrest. Treaty between United States and Mexico, Art. VIII, 31 Stat. 1818.

10. Extradition and Detainers ⇐5

A "political offense" under extradition treaties is an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion; an offense is not of a political character simply because it was politically motivated.

See publication Words and Phrases for other judicial constructions and definitions.

11. Extradition and Detainers ⇐5

U.S. citizens, who had been charged by Mexico with the attempted kidnapping of the Cuban consul for purposes of ransoming him for political prisoners being held in Cuba, were not entitled to haven under article of United States—Mexico Extradition Treaty barring extradition for crimes of a purely political character. Treaty between United States and Mexico, Art. iii, 31 Stat. 1818.

12. Extradition and Detainers ⇐4

Executive's discretionary determination to extradite fugitive, even one who is United States national, is not generally subject to judicial review; the ultimate decision to extradite is a matter within the exclusive prerogative of the executive in the exercise of its powers to conduct foreign affairs. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818; 18 U.S.C.A. §§ 3184, 3186.

13. Extradition and Detainers ⇐4

Secretary of State always has discretion to refuse to extradite, even if magistrate concludes that fugitive is extraditable. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818; 18 U.S.C.A. §§ 3184, 3186.

14. Constitutional Law ⇐255(6)
Extradition and Detainers ⇐4

Discretion given executive to extradite United States nationals did not violate due process, despite contention that no standards were provided to guide the exercise of such discretion. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818; 18 U.S.C.A. §§ 3184, 3186; U.S.C.A.Const. Amend. 5.

15. Extradition and Detainers ⇐4

Executive discretion to extradite nationals under United States—Mexico Extradition Treaty had not been repealed, despite contention that Treaty had been modified by practice of both governments to refuse to surrender their own nationals. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818.

16. Constitutional Law ⇐72

Question whether United States should refuse to extradite its citizens because of Mexico's failure to extradite its nationals was one for Executive Branch, not the courts, to decide. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818.

17. Constitutional Law ⇐72

Whether extradition of United States citizen should be barred due to risk to citizen's life from extradition was an issue that properly fell within exclusive purview of Executive Branch. Treaty between United States and Mexico, Art. IV, 31 Stat. 1818.

John H. Lipinski, Miami, Fla., for Escobedo.

R. Jerome Sanford, Asst. U. S. Atty., Miami, Fla., Murray R. Stein, U. S. Dept. of Justice, Washington, D. C., for United States.

Weiner, Tunkey, Robbins, & Ross, P. A., Jeffrey S. Weiner, Miami, Fla., M. Cherif Bassiouni, Chicago, Ill., for Castillo.

Appeals from the United States District Court for the Southern District of Florida.

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

This is an appeal from orders denying requests for *habeas corpus* relief in international extradition proceedings. On December 8, 1977, the Government of Mexico, pursuant to the United States-Mexico Extradition Treaty of 1899 [1], requested extradition of two United States citizens, Gaspar Eugenio Jimenez Escobedo and Gustavo Castillo (petitioners), for prosecution on charges of murder, attempted murder, and attempted kidnapping. In response to this request, petitioners were arrested in the Southern District of Florida. After holding an evidentiary hearing under 18 U.S.C.

1. Treaty of Extradition Between the United States of America and the United Mexican States, Feb. 22, 1899, 31 Stat. 1818, T.S. 242 [referred to herein as Extradition Treaty]. A new extradition treaty which entered into force on January 25, 1980, has superceded the 1899 Treaty. 17 *Int'l. Legal Materials* 1068 (1978). However, Art. 22(2) of the 1980 Treaty provides that, "Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 Feb. 1899 [as supplemented]." Therefore, this extradition request, which has been in process since 1977, is governed by the 1899 Treaty

§ 3184[2], a United States Magistrate, on May 31, 1978, issued a Certificate of Extraditability and Order of Commitment for both petitioners. The magistrate found, *inter alia*, that petitioners are the individuals sought by Mexico, that the crimes for which petitioners are sought are extraditable offenses under the Treaty, and that there is probable cause to believe that petitioners committed those crimes in Mexico.

On June 2 and June 21, 1978, Escobedo and Castillo, respectively, filed the instant petitions for writs of *habeas corpus*, seeking to block their extradition. By orders entered December 26, 1978, the Southern District of Florida denied the petitions. This appeal followed. Petitioners urge that the district court erred in not granting the writ because: (1) the evidence offered at the extradition hearing did not establish probable cause to believe that they committed the crimes charged; (2) the offenses charged by Mexico are political in character; (3) petitioners, as United States nationals, are not subject to extradition; and (4) certain humanitarian considerations bar extradition.[3]

SCOPE OF REVIEW

[1] The scope of *habeas corpus* review of a magistrate's extradition order is quite narrow. Such review is limited to determining "whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925); *Gusikoff v. United States*, 620 F.2d 459, 461 (5th Cir. 1980); *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1191 (5th Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972). The writ is not a means for rehearing the magistrate's findings. *Fernandez v. Phillips*, 268 U.S. at 312, 45 S.Ct. at 542; *Garcia-Guillern v. United States*, 450 F.2d at 1191–92.

PROBABLE CAUSE

As stated, petitioners are charged by the Mexican government with murder, attempted murder and attempted kidnapping. These charges arise out of an alleged attempt by petitioners, along with Orestes Ruiz Hernandez[4] to kidnap the Cuban Consul in Merida, Mexico, Daniel Ferrer Fernandez, on July 23, 1976. During the attempt, an associate of the Consul, Artagnan Diaz y Diaz, was shot and killed. Although bullets were allegedly fired at the Consul, he escaped without injury. Escobedo was arrested at the Mexico City airport the day after the incident. He subsequently es-

2. 18 U.S.C. § 3184 provides:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

3. Using at times somewhat different arguments, both petitioners, in separate briefs, urge the first three grounds as bars to extradition. Only Escobedo raises the fourth ground. In reviewing each argument raised in support of the first three grounds, we shall not always specify which petitioner is the author of the argument.

4. Hernandez, presently incarcerated in Mexico, is not a party to this proceeding.

caped from a Mexican jail and fled to the United States. Castillo was never apprehended by Mexican authorities.

[2] In reviewing the existence of probable cause to sustain the charges against petitioners "or, in other words, the existence of a reasonable ground to believe the accused guilty," our function "is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court." *Garcia-Guillern v. United States*, 450 F.2d at 1192; *Gusikoff v. United States*, *supra*, 620 F.2d at 462.[5] In this case, the evidence introduced at the extradition hearing to prove probable cause consisted of various documents submitted by Mexico in support of its extradition request.[6]

[3–5] With respect to Escobedo, the documents show that explosives and firearms were found in his luggage at the time of his arrest.[7] A ballistics report contained in the Extradition Documents concludes that the bullet that killed Diaz y Diaz was fired from one of these firearms.[9] With respect to Castillo, the documents contain a third party's report of a deposition given by the Cuban Consul, Fernandez, to a Mexican official on July 24, 1976.[9] The report states that during the deposition, the Consul was shown a picture of Castillo, and that he "recognized him as one of the persons who performed the attack."[10] At this deposition, and in a statement given to authorities on the day of the attack[11], the Consul is also reported as saying that one of the attackers approached him with a gun, that he thought bullets were fired at him during the incident, and that the attackers attempted to kidnap him. Furthermore, the documents indicate that Castillo's passport was found in Escobedo's luggage at the time of Escobedo's arrest.[12] We hold that this evidence establishes probable cause to believe that both petitioners committed the crimes charged.[13]

5. As we said in *Gusikoff*:

> Hearings held pursuant to Section 3184 are in the nature of a preliminary hearing. (Citation omitted.) The foreign country does not have to show actual guilt, only probable cause that the fugitive is guilty. (Citations omitted.) The magistrate does not inquire into the guilt or innocence of the accused; he looks only to see if there is evidence sufficient to show reasonable ground to believe the accused guilty. (Citation omitted.) The magistrate also determines whether the offense charged is extraditable and whether the person brought before him is the one accused of crime.

620 F.2d at 462, *quoting from Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903, 90 S.Ct. 1688, 26 L.Ed.2d 61 (1970).

6. An English translation of these documents was also introduced.

7. English Translation of Mexican Extradition Documents [hereinafter referred to as Extradition Documents or Documents] at 35–36; 55–60.

8. *Id.* at 71–73.

9. *Id.* at 28–30.

10. Castillo contends that this report cannot be used to establish probable cause because it constitutes compound hearsay and is untrustworthy. Hearsay, however, is permitted in extradition proceedings. *See, e. g., Bingham v. Bradley*, 241 U.S. 511, 517, 36 S.Ct. 634, 637, 60 L.Ed. 1136 (1916); *Shapiro v. Ferrandina*, 478 F.2d 894, 902 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973); *Ssyne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903, 90 S.Ct. 1688, 26 L.Ed.2d 61 (1970). Further, the credibility of the reported identification is a matter committed to the magistrate and is not reviewable on *habeas corpus*. *See Garcia-Guillern v. United States*, 450 F.2d at 191–92; *Merino v. United States Marshal*, 326 F.2d 5, 12 (9th Cir. 1963), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1922, 12 L.Ed.2d 1046 (1964).

11. Extradition Documents at 9.

12. *Id.* at 56.

13. The Extradition Documents include confessions made to Mexican authorities by Escobedo and Orestes Ruiz Hernandez. Petitioners contend that these confessions cannot be used for the purpose of establishing probable cause because they were obtained by means of torture. We do not reach this contention because we conclude that the evidence independent of the confessions, discussed above, establishes probable cause. *Cf. Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976) (evidence not obtained from allegedly illegal wiretap sufficient to show probable cause for extradition).

[6, 7] Petitioners contend, however, that the Mexican Extradition Documents should not have been admitted at their extradition hearing; they argue that these documents would have been inadmissible for the purpose of proving probable cause in a Florida court. This argument is without merit. State law does not control the reception of evidence at extradition hearings. *Collins v. Loisel*, 259 U.S. 309, 317, 42 S.Ct. 469, 472, 66 L.Ed. 956 (1922); *Shapiro v. Ferrandina*, 478 F.2d at 901–02; *Sayne v. Shipley*, 418 F.2d at 685. The admissibility of the Mexican Extradition Documents is governed by 18 U.S.C. § 3190, which provides:

> § 3190. Evidence on hearing
>
> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Since the Mexican Extradition Documents were properly certified by the United States Ambassador to Mexico, they were authenticated, and admissible under section 3190. *See, e.g., Shapiro v. Ferrandina*, 478 F.2d at 901–02; *Jimenez v. Aristeguieta*, 311 F.2d 547, 562 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963).

[8] Petitioners next contend that the English translation of the Mexican Extradition Documents contains various inaccuracies and therefore should not be relied upon in assessing probable cause. We reject this argument. After receiving the testimony of an interpreter who appeared on petitioners' behalf, Supp. Record 129–139, the magistrate found that petitioners had failed to impeach the accuracy of the translation. We agree with this finding. In any event, even if petitioners' interpretation of the Documents were accepted, the Documents still support the presence of probable cause.

[9] Finally, petitioners argue that the evidence used to establish probable cause did not satisfy Article VIII of the Extradition Treaty. Article VIII states:

> When . . . the fugitives shall have been merely charged with a crime or offense, [an] . . . authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the *depositions upon which such warrant may have been issued*, must accompany the requisition as aforesaid.

(Emphasis added). Petitioners contend that Article VIII was breached because none of the documents submitted by Mexico constitute "depositions" in the strictly legal sense, namely:

> The testimony of a witness taken upon interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law on the subject, and reduced to writing and duly authenticated, and intended to be used upon the trial of an action in court.

Black's Law Dictionary (4th ed. 1968). This argument is unpersuasive. The purpose of Article VIII is to provide the asylum country both with proof of the charges brought by the requesting country and with the evidence supporting those charges. The extradition papers forwarded by Mexico fulfill this dual purpose. They include copies of the warrants for petitioners' arrests as well as documents establishing probable cause to believe that the crimes charged were committed.[14] While these documents may not constitute depositions in the strictly legal sense [15], we hold that they do satisfy Article

14. Several of these documents are reports of depositions made by others.

15. We note that the term "deposition," in the generic sense, means simply "an affidavit, an oath, a statement under oath." Ballentine Law

VIII. To bar extradition, despite the existence of properly authenticated documents establishing probable cause, because of a narrow and technical definition of the term "deposition" would defeat the intent of the Treaty parties. "It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10, 57 S.Ct. 100, 81 L.Ed. 5 (1936).[16]

POLITICAL OFFENSE EXCEPTION

Article III of the Extradition Treaty bars extradition, "When the crime or offense charged shall be of a purely political character." Petitioners argue that Mexico's charges, on their face, bring this case within Article III. Mexico charges that petitioners attempted to kidnap the Cuban Consul for the purpose of ransoming him for political prisoners being held in Cuba. These charges trigger the political offense exception because, say petitioners, a political offense includes "a common crime . . . committed by an ideologically motivated offender . . . where the common crime is intricately linked to the ideology, motive and intent of the alleged offender." [17] We disagree.

[10, 11] This circuit defines a political offense under extradition treaties as an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion. *Garcia-Guillern v. United States*, 450 F.2d at 1192; *Jimenez v. Aristeguieta*, 311 F.2d at 560.[18] An offense is not of a political character simply because it was politically motivated. In this case, petitioners do not contend, and the evidence offered at the extradition hearing does not show, that the charges arising out of the alleged attempted kidnapping were committed in the course of and incidental to a violent political disturbance. Therefore, petitioners are not entitled to haven under Article III of the Treaty.

NATIONALITY

Article IV of the Extradition Treaty, on its face, invests the Executive Branch of each treaty party with discretion to surrender its own nationals. It states:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

Despite this language, petitioners contend that as United States citizens, they are not subject to extradition to Mexico. Their argument is three-fold.

First, petitioners argue that the discretion given the Executive under Article IV violates due process because no standards

Dictionary, (3d ed. 1969); accord, 26A C.J.S. Depositions § 1 at 287 (1956).

16. The comments of J. G. Hawley are appropriate:

> While in extradition cases the substance of the matter ought to be carefully examined before a man is taken away from the jurisdiction whose protection he is entitled to invoke, there are many reasons why strict technical accuracy is not to be required. The papers are prepared by persons who are educated under foreign codes of law and accustomed to different methods of procedure from those in use in the United States. If a merely technical objection is unnecessarily sustained, it must usually result in a considerable delay if not in a failure of the purposes of extradition altogether. Therefore, in these cases, American magistrates, while for the most part careful not to allow extradition in cases where they were not sufficiently satisfied as to the merits, have been solicitous to prevent a failure of justice by giving effect to merely technical objections.

J. G. Hawley, *Law and Practice of International Extradition*, 41–42 (1893).

17. Brief for Petitioner Castillo at 35. Escobedo also argues that the alleged offenses were motivated by ideology rather than ill will toward the victims or a desire for monetary gain. Brief for Petitioner Escobedo at 20–21.

18. This definition is derived from the English case of *In Re Castioni*, [1891] 1 Q.B. 149 and is followed by other American courts, *see, e.g. Sindona v. Grant*, 619 F.2d 167 at 173 (2d Cir. 1980). *In re Ezeta*, 62 F. 972, 977–1002 (N.D. Cal.1894). *See generally* I. A. Shearer, *Extradition in International Law* (1971).

are provided to guide the exercise of this discretion. We reject this argument. Contrary to petitioners' suggestion, a United States citizen may not be whisked away to a foreign country for trial by Executive whim. Under 18 U.S.C. § 3186 [19], the Secretary of State may not surrender any person to a foreign government unless the person has been found extraditable by a magistrate at a hearing held under 18 U.S.C. § 3184. Executive discretion arises only if the magistrate determines that there is "evidence sufficient to sustain the charge under the provisions of the proper treaty." *Id.* These statutory provisions safeguard the fugitive's due process rights. *See Peroff v. Hylton*, 563 F.2d 1099, 1102–03 (4th Cir. 1977); *Sayne v. Shipley*, 418 F.2d at 686.

[12, 13] Assuming that the magistrate's decision is in favor of extradition, the Executive's discretionary determination to extradite the fugitive [20]—even one who is a United States national—is not generally subject to judicial review.[21] The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs. *Sindona v. Grant, supra; Peroff v. Hylton*, 563 F.2d at 1102–03; *Shapiro v. Secretary of State*, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd. sub nom. Commissioner of Internal Revenue Service v. Shapiro*, 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965) ("Review by *habeas corpus* . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the Executive Branch to decide."); M.C. Bassiouni, *International Extradition and World Public Order*, 29–34 (1974). This principle was applied in *Peroff v. Hylton, supra*, a case involving the United States-Sweden Extradition Treaty. Article VII of that treaty is substantially identical to Article IV of the treaty with Mexico. The petitioner in *Peroff*, a United States citizen, characterized the Executive's exercise of discretion to extradite nationals under Article VII as an "administrative determination," and claimed that he was entitled, as a matter of due process, to a hearing before the Secretary of State on the propriety of his extradition.[22] Holding that it would be improper for a court to impose such a hearing requirement, the Fourth Circuit stated:

> The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States. Thus, while Congress has provided that extraditability shall be determined in the first instance by a judge or magistrate, 18 U.S.C. § 3184, the ultimate decision to extradite is 'ordinarily a matter within the exclusive purview of the Executive.'

563 F.2d at 1102. The court concluded that the requirements of procedural due process were satisfied by the hearing provided under 18 U.S.C. § 3184 and by *habeas corpus* review. *Id.* at 1102–03.

19. Section 3186 provides:

> **§ 3186. Secretary of State to surrender fugitive**
>
> The Secretary of State may order the person committed under sections 3184 or 3185 of this title [18 USCS § 3184 or 3185] to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.
>
> Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.
>
> A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

20. The Secretary of State always has discretion to refuse to extradite, even if the magistrate under 18 U.S.C. § 3184 concludes that the fugitive is extraditable. *See* 18 U.S.C. § 3186 (the Secretary of State "may" extradite the person committed under section 3184); *Sindona v. Grant, supra*, 619 F.2d at 176; *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965); M.M. Whiteman, 6 Digest of International Law 1046 (1968) [hereinafter referred to as Whiteman].

21. Petitioners do not contend that the Secretary of State uses constitutionally impermissible criteria in exercising this discretion.

22. This hearing would have been in addition to the judicial hearing provided under 18 U.S.C. § 3184.

[14] The same sensitivity to the Executive's role in foreign affairs, which prompted the *Peroff* court's refusal to prescribe the procedures by which the Executive exercises its discretion over the extradition of nationals, causes us to reject petitioners' argument that this discretion should be confined within specific standards.

[15] Second, contending that a treaty may be modified subsequent to its entry into force by the practice of the parties[23], petitioners claim that ever since the first extradition treaty between the United States and Mexico was concluded in 1861, both governments have consistently refused to surrender their own nationals. Because of this practice, petitioners urge that we hold that Article IV's grant of Executive discretion to deliver up nationals has been repealed. We decline this invitation. Most of the incidents cited by petitioners as evidence of the United States'[24] and Mexico's practice of not surrendering nationals occurred prior to the Supreme Court's 1936 decision in *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5. Yet, in *Valentine*, the court expressly stated that under Article IV, the Secretary of State had discretionary power to surrender United States citizens.[25] *Id.* at 12–17. Indeed, the Court suggested that one of the very reasons the 1899 Treaty was written was to give the Executive this power; the 1861 Treaty which it replaced had been interpreted as not giving the Executive authority to extradite United States citizens. *Id.*

Furthermore, the argument that the treaty parties, through their conduct, have expressed an intention to remove the Executive discretion clause from Article IV is substantially undermined by the terms of the recently executed extradition treaty between the United States and Mexico. 17 *Int'l. Legal Materials* 1068 (1978). Article 9 of the new treaty provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

While the new treaty does not control this extradition proceeding, see note 1, *supra*, the fact that it invests the Executive with the same discretion as was given under Article IV of the old treaty is evidence that the parties never intended to eliminate this discretion.

[16] Finally, petitioners argue that under due process and equal protection principles, they should not be subject to extradition because Mexico does not reciprocate by extraditing its nationals. This argument was rejected by the Supreme Court in

23. Without deciding the point, we shall assume *arguendo* that a treaty may be modified by the subsequent practice of the parties. *See, generally*, G. Schwarzenberger, *A Manual of International Law*, 167–68 (5th ed. 1967); 14 Whiteman at 399–406.

24. We note in passing that petitioners' assertion that the United States has consistently refused to extradite its nationals under Article IV is factually flawed. The United States has surrendered its nationals under that Article. See 6 Whiteman at 866. As stated in a letter from the American Ambassador at Mexico City to a Mexican official:

> 'Consistent with the long-standing position of the Government of the United States of America . . . the United States has, in addition to the three United States citizens previously mentioned, granted the extradition of United States citizens [to Mexico] over a period of many years [citing several instances].'

Letter from U.S. Ambassador to Mexico, Hill, to Acting Minister of Foreign Relations of Mexico, Gorostiza (Aug. 22, 1960), *quoted in* 6 Whiteman at 879.

25. The specific question in *Valentine* was whether the 1909 Extradition Treaty with France gave the President power to surrender United States citizens. Holding in the negative, the Court contrasted the French treaty, which did not affirmatively grant such power, with Article IV of the Mexican treaty. 299 U.S. at 12–17, 57 S.Ct. at 104–106.

Charlton v. Kelley, 229 U.S. 447, 469–76, 33 S.Ct. 945, 952–955, 57 L.Ed. 1274 (1913), and more recently by the Fourth Circuit in *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). We do the same. The question whether the United States should refuse to extradite its citizens because of Mexico's failure to reciprocate [26] is one for the Executive Branch, not the Courts, to decide.[27]

HUMANITARIAN CONSIDERATIONS

[17] Alleging that he may be tortured or killed if surrendered to Mexico, Escobedo asks that we bar his extradition on humanitarian grounds. However, "the degree of risk to [Escobedo's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch. *See Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 [97 S.Ct. 787, 50 L.Ed.2d 778] (1977) . . ." *Sindona v. Grant*, *supra*, 619 F.2d at 174.

The district court's order denying the writ of *habeas corpus* is

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Henry FORREST,
Defendant-Appellant.

No. 79-5530
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 14, 1980.

Defendant was convicted in the United States District Court for the Northern District of Georgia, William Stafford, J., of perjury and of jury tampering, and he appealed. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) evidence was sufficient to sustain perjury conviction; (2) allegedly false statements made by defendant at suppression hearing were "material" to issue before court so as to constitute violation of perjury statute; (3) evidence was sufficient to sustain jury tampering conviction; (4) trial judge did not err in denying severance of charges; (5) trial judge did not err in denying pretrial motion for continuance; and (6) defendant was not deprived of fair trial due to alleged prejudice resulting from his appearance in prison garb before jury venire.

Affirmed.

26. The justification often given for the differing practices of the United States and Mexico with respect to extradition of nationals is that the two countries have different concepts of criminal jurisdiction. Mexico, which generally refuses to extradite nationals, has the power, under its laws, to prosecute its citizens for offenses committed abroad. By contrast, the United States, which frequently surrenders its citizens, is generally unable, under its laws, to prosecute its citizens for crimes committed outside its territorial jurisdiction. 6 Whiteman at 876, 878–84. *See also* I.A. Shearer, *Extradition in International Law*, 115 (1971).

27. In *Charlton*, the Court stated:

> The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

229 U.S. at 476, 33 S.Ct. at 955. Similarly, in *Peroff*, the Court ruled that,

> Even if the claimed lack of reciprocity were construed to be a violation of treaty obligations, it would be for the Executive alone to determine whether to waive such violations or to renounce the extradition agreement.

563 F.2d at 1102.

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

In the present case the motion to set aside was denied, not granted, and as it was made after the lapse of the term, and came within no exception, the general rule was applicable. If then the Court of Appeals had entertained jurisdiction, the result would have been an affirmance; and even if the court erred in declining jurisdiction, the difference between dismissing the appeal and affirming the order does not, in the circumstances, require reversal or modification.

Judgment affirmed.

WRIGHT *v.* HENKEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 661. Argued April 28, 29, 1903.—Decided June 1, 1903.

1. The general principle of international law in cases of extradition is that the act on account of which extradition is demanded must be a crime in both countries.
2. As to the offence charged in the case, this applicable treaty embodies that principle in terms by requiring it to be "made criminal by the laws of both countries."
3. If the offence charged is criminal by the laws of the demanding country and by the laws of the State of the United States in which the alleged fugitive is found, it comes within the treaty and is extraditable.
4. Bail cannot ordinarily be granted in extradition cases, but it is not held that the Circuit Courts may not in any case, and whatever the special circumstances, extend that relief.

WHITAKER WRIGHT applied to the Circuit Court of the United States for the Southern District of New York for writs of *habeas corpus* and certiorari on March 20, 1903, by a petition which alleged:

(1.) That he was a citizen of the United States restrained of his liberty by the Marshal of the United States for the Southern District of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States Commis-

sioner for the Southern District of New York, and commissioner duly authorized by the District Court of the United States for the Southern District of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the District Court of the United States for the Southern District of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery of certain offenders,' approved August 12, 1848, and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whit-

aker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain."

(2.) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offence herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be

detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offence within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any proceedings under the complaint and warrant on the ground that the commissioner had no jurisdiction, but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and in support of the application filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7.) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the Eighth Amendment of the Constitution, and section 1015 of the Revised Statutes, and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted and after hearing dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. The case was then brought to this court by appeal.

At the argument it was made to appear that on March 31 His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers and writings belonging to the said company or corporation and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant, issued by one of His Majesty's justices of the peace, for the city of London, for the apprehension of the said Whitaker Wright, for the offence herein first enumerated, and a certified copy of the information and complaint of the Senior Official Receiver in Companies Liquidation (acting under the order of the High Court of Justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams on which information and complaint and depositions, the said warrant was granted for the apprehension of the said Whitaker Wright," etc. Copies of these papers accompanied the complaint, and reference was made to cable messages from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint of March 16, and consented

to the discharge of the prisoner from the arrest thereon. The commissioner held that as the proceedings under the previous warrant had been carried into the Circuit Court, he was without power to discharge the prisoner under that warrant. Subsequently the order of the Circuit Court dismissing the writs of *habeas corpus* and certiorari and remanding the prisoner was brought to the commissioner's attention, but counsel for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that pending such proceedings he must decline to dismiss the complaint and discharge the prisoner.

Article X of the treaty of 1842, 8 Stat. 572, 576, reads as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assult with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided* That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

Article I of the treaty of 1889, 26 Stat. 1508, is:

"The provisions of the said tenth article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offences against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be

liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the Companies' Act of 1862, 25 and 26 Vict. c. 89, provides:

"If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of section 611 of the New York Penal Code read as follows:

"SEC. 514. *Other cases of forgery in third degree.* A person who either, (1) being an officer or in the employment of a corporation, association, partnership or individuals falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys

any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association or partnership or individuals; . . . is guilty of forgery in the third degree."

"SEC. 611. *Misconduct of officers and employés of corporations.* A director, officer, agent or employé of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By section 15 it is provided: .

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870, 33 and 34 Vict. c. 52, it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of *habeas corpus*." If he is not surrendered and conveyed out of the United Kingdom "within two months after such committal, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force."

By section 5273 of the Revised Statutes, Title LXVI, Extradition, it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any State, on notice, unless sufficient cause is shown to the contrary.

Section 5270 is as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Mr. Samuel Untermyer and *Mr. Louis Marshall* for appellant.

I. The crime charged against the appellant is not one which is "made criminal by the laws of both countries," to wit, the United States and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the

extradition treaties between these governments. 1 Moore on Extradition, 21; *United States* v. *Rauscher*, 119 U. S. 407; *Terlinden* v. *Ames*, 184 U. S. 270; Art. X, Webster-Ashburton Treaty of 1842; Art. X, Supplemental Treaty of 1889. The language of the treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatures of the treaty have expressly created. The whole subject of foreign intercourse is committed to the Federal government. *Tucker* v. *Alexandroff*, 183 U. S. 436; *Doe* v. *Braden*, 16 How. 657; *People ex rel. Barlow* v. *Curtis*, 50 N. Y. 321. As to definitions of the word country, see Webster's Dictionary; *Stairs* v. *Peaslee*, 18 How. 521; *United States* v. *The Recorder*, 1 Blatchf. 27; *S. C.*, 27 Fed. Cas. 718; Vattel, Bk. 1, c. 19, § 211.

As to meaning of phrase and English interpretation, see *Re Windsor*, 6 Best & Smith, 522; *Re Arton, No. 2*, 1896, L. R. Q. B. D. 509; *Re John C. Eno*, 10 Quebec L. R. 194; *Re Lamirand*, 10 Jur. 290; *Re Tully*, 20 Fed. Rep. 812, citing English cases. The language of the treaty is not "made criminal by *a law* of both countries" but "*by the laws* of both countries;" the case is not determined by saying that a statute of a State is a law of this country; it must be ascertained what is *the* law.

The right to extradite and the rules of evidence to establish the crime are not convertible propositions. *Re Farez*, 7 Blatchf. 345; *Re Wadye*, 15 Fed. Rep. 864; *Re Charleston*, 34 Fed. Rep. 531, cited and distinguished. Sec. 5209, U. S. Rev. Stat., applies only to national banks and cannot be considered as the counterpart of the English statute relating to frauds by directors of corporations; N. Y. Penal Code, § 611, is materially different from § 84 of the English Larceny Act. An examination of the statutes of every State and Territory shows that in a majority thereof there is no provision whatever defining criminal acts of directors of corporations and in most instances where such offences are defined the offence is materially different from that described in the English Larceny Act.

The contention of the British government is that if instead of landing in New York, the petitioner had landed in a State in which the act complained of is not made criminal he could

not be extradited but he can be because he landed in New York.

II. The court below in the exercise of its inherent power had the power and jurisdiction to admit the appellant to bail. Bail was denied on the ground that there was no power to admit to bail one arrested under the extradition act.

Neither the treaty nor the Revised Statutes contain prohibitions against admitting to bail. If the petitioner had been arrested here for a heinous crime (not capital), if he had been arrested in England for this crime, if he were a fugitive from the United States and had been arrested for an extraditable offence, if he had been arrested in interstate rendition proceedings, he could have been admitted to bail. It is the policy of this government to admit to bail any person arrested in any kind of proceeding except for contempt and for capital offences. Eighth Amendment U. S. Const.; Art. I, § 5, Const. New York; § 1015, U. S. Rev. Stat. As to power of United States commissioners to admit to bail, see *United States* v. *Hom Hing*, 48 Fed. Rep. 638, and see also *United States* v. *Hamilton*, 3 Dallas, 17; *Ex parte Virginia*, 100 U. S. 343; *Hudson* v. *Parker*, 156 U. S. 277; *Benson* v. *McMahon*, 127 U. S. 457, 462; *United States* v. *Volz*, 14 Blatchf.; 28 Fed. Cas. 384; *United States* v. *Rundlett*, 2 Curt. 41; 27 Fed. Cas. 915; *United States* v. *Dana*, 68 Fed. Rep. 886, and cases cited. The right to give bail has been recognized under the Chinese Exclusion Act in proceedings which are analogous to extradition proceedings. *Re Ah Kee*, 21 Fed. Rep. 701; *Re Chow Goo Pooi*, 25 Fed. Rep. 77; *In re Li Sing*, 180 U. S. 486; *United States* v. *Mrs. Gue Lim*, 176 U. S. 459; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 652; *Chin Bak Kan* v. *United States*, 185 U. S. 213. The law of New York recognizes the right to give bail. Code Civil Procedure, §§ 550—592; Code Criminal Procedure, § 831. See also *State* v. *Hufford*, 23 Iowa, 579, and cases cited as to inherent powers of courts, *infra*.

The right to give bail in England is recognized. *Queen* v. *Spilsbury*, (1898) 2 Q. B. D. 615; *Ex parte Foster*, (1872) Consol. Digest of Quebec, *sub.* Extradition. The general proposition may be stated that any court or magistrate having power to

try a prisoner has jurisdiction to discharge him and *a fortiori* to admit him to bail. *People* v. *Goodwin*, 1 Wheeler's Criminal Cas. 434; *People* v. *McLeod*, 1 Hill, 377; 1 Burr's Trial (Robertson) 18–20 and 106; *People* v. *Van Horne* (murder), 8 Barb. 158; *State Treasurer* v. *Rolfe*, 15 Vermont, 9; *State* v. *Edney*, 4 Dev. & B. 378. As to power of English courts, *Rex* v. *Rudd*, Cowp. 331; *Rex* v. *Marks*, 3 East, 157; *Rex* v. *Baltimore*, 4 Burrows, 2179; 3 Hawk. Pl. Cr. 225; 4 Black. Com. 299; 1 Hale's Pl. Cr. 129; 4 Coke's Inst. 71; *Comb's Case*, 10 Mod. 334; Habeas Corpus Act, 31 Charles II; 2 Hale's Pl. Cr. 128; *Rex* v. *Judd*, 2 T. R. 255; *Linford* v. *Fitzroy*, 13 Jur. 303; *Ex parte Tayloe*, 5 Cow. 39. Other American authorities on inherent power of the court to take bail: *United States* v. *Evans*, 2 Fed. Rep. 152; Church on Habeas Corpus, 2d ed. § 390; 1 Bishop's New Cr. Proc. §§ 251, 1406, 1407; *Ex parte Robinson*, 19 Wall. 505; *United States* v. *Hudson*, 7 Cranch, 302; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Terry*, 128 U. S. 302; *Cartright's Case*, 114 Massachusetts, 230; *In re Neagle*, 39 Fed. Rep. 856; *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 124 U. S. 131, 143. As to general inherent powers: *Bath County* v. *Amy*, 13 Wall. 244; *Labette County Commr.* v. *United States*, 112 U. S. 217; *Matter of Henderson*, 157 N. Y. 423. *In re Carrier*, 57 Fed. Rep. 578, distinguished; *Gorsline's Case*, 21 How. Pr. 85, cited and distinguished as overruled in *People* v. *Clews*, 77 N. Y. 39, and *Taylor* v. *Taintor*, 16 Wall. 371; *Re Vonder, The*, 85 Fed. Rep. 959, and see also *Cosgrove* v. *Winne*, 174 U. S. 64.

III. Assuming that the power to take bail exists there is every reason why the petitioner should be admitted to bail.

IV. The petitioner should be discharged or the court below instructed to admit him to bail.

Mr. Charles Fox for His Britannic Majesty's consul general at New York, appellee.

I. No examination having been commenced prior to the proceedings on *habeas corpus* now here for review, this court will confine its inquiry to the question of jurisdiction of the commissioner. *Terlinden* v. *Ames*, 184 U. S. 270, citing *Ornelas*

v. *Ruiz*, 161 U. S. 502; *Bryant* v. *United States*, 167 U. S. 104; *In re Shipp*, 12 Blatch. 501.

II. The commissioner had jurisdiction to issue the warrant upon the complaint made by the appellee. A complaint in an extradition case need not be as precise, technical and formal as an indictment. It is sufficient if it be clearly set forth and it appears that a treaty offence is charged. *Rice* v. *Ames*, 180 U. S. 371; *Re Roth*, 15 Fed. Rep. 507; *Re Farez*, 7 Blatch. 48; *Re Sterneman*, 77 Fed. Rep. 576; *Re Heinrich*, 5 Blatch. 414, 460; *Re Adutt*, 55 Fed. Rep. 376; *Re Grin*, 112 Fed. Rep. 790.

III. The complaint could be made on information and belief. Cases cited and *Re Kane*, 6 Fed. Rep. 34.

IV. The offence charged in the complaint is made criminal by the laws of both countries. §§ 83, 84, ch. 96, 24 & 25 Vict.; Companies Act of 1862, 25 & 26 Vict. ch. 89, § 166; § 5029 U. S. Rev. Stat.; Art. X, Treaty of 1842. That laws of New York are to govern, 4 Op. Atty. Genl. 330; *Re Farez*, 7 Blatch. 357; *Re Wadge*, 15 Fed. Rep. 865; *Re Clarkson*, 34 Fed. Rep. 533; and see as to evidence, *Grin* v. *Shine*, 187 U. S. 181. The treaty should be construed liberally. *Tucker* v. *Alexandroff*, 183 U. S. 424; *Grin* v. *Shine*, 187 U. S. 181. Under the laws of New York, where the appellant was found, the offence is a crime the same as in England. Penal Code, N. Y. § 611. See *Re Arton, No. 2*, 1896, 1 Q. B. D. 509. *Re Windsor*, distinguished. The same construction was applied to treaty between France and Great Britain. *Re Bellecontre*, 17 Cox C. C. 253; *Ex parte Piot*, 15 Cox C. C. 208.

V. The petitioner has no right of asylum in the United States. *Kerr* v. *Illinois*, 119 U. S. 436; *Grin* v. *Shine*, 187 U. S. 181.

VI. That the appellant is a citizen of the United States gives him no immunity to commit crimes in other countries, and does not prevent his surrender under a treaty of extradition, which makes no exception in favor of subjects of the surrendering country. *Neely* v. *Henkel*, 180 U. S. 123; Moore on Extradition, § 136; Executive Docs. U. S. No. 156, 1884.

VII. The appellant is not entitled to be discharged from

custody by reason of the insufficiency of the complaint before the court, a new complaint having been made remedying the defects in the first complaint. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Iasigi* v. *Van De Carr*, 166 U. S. 392. The arrest on the second warrant was not illegal. *Re McDonnell*, 11 Blatch. 170.

VIII. The appellant is not entitled to be enlarged on bail, under any rule of law of the United States. *Queen* v. *Spilsbury*, 2 Q. B. D. 615, distinguished. The right to bail is negatived by implication. The laws of the United States never contemplated any provision whereby there should be a possibility of a miscarriage of the provisions of the treaty, and have carefully refrained from permitting a nullification of the treaty in a particular case by a release on bail and escape. Bail in interstate cases is taken in virtue of statutes. Where no statute exists it has been held bail could not be taken.

IX. It was not necessary that a warrant should have been issued or an indictment had before the commencement of these proceedings. *Grin* v. *Shine* and *Re Farez*, cited *supra*.

Mr. Solicitor Genl. Hoyt, with whom *Mr. Assistant Attorney Genl. Purdy* was on the brief, on behalf of the United States.

The appeal herein should be dismissed for the reason that all proceedings under the complaint of March 16, 1903, and the warrant of arrest issued thereon have been abandoned by the British Government.

If the laws of the State of New York, wherein the petitioner was arrested, make the act charged in the complaint criminal, which act is made criminal by the laws of Great Britain, the petitioner could be properly held for extradition under the extradition treaty between the United States and Great Britain, notwithstanding the fact that such acts as are charged in the complaint are not made criminal by the statutes of the United States. Moore on Extradition, secs. 337, 344; 4 Op. Atty. Gen. 330; *In re Muller*, 17 Fed. Cas. 975; *In re Farez*, 7 Blatchf. 345; *Grin* v. *Shine*, 187 U. S. 181; *Cohn* v. *Jones*, 100 Fed. Rep. 639; *In re Frank*, 107 Fed. Rep. 272; sec. 611, par. 3, Penal Code of New York; sec. 84, c. 96, 24 & 25 Vict.

The petitioner was not entitled to be enlarged on bail under

It must be borne in mind in considering the elements of the authority to take bail that it is not a question of absolute *right* in a defendant, but of *power* and discretion in the courts. The Federal law as to bail is limited to crimes and offences against the United States. *Rice* v. *Ames*, 180 U. S. 371. Not only is there no affirmative authority for taking bail in extradition, but sec. 5270 directs commitment to jail, "there to remain," etc., when the evidence is deemed sufficient to sustain the charge. That a magistrate may finally discharge does not necessarily justify admission to bail in the interim. In the particular and peculiar subject of extradition a magistrate must look forward to possible surrender, and must guard his custody so that the contract may be performed. For an analogy see *Gorsline's Case*, 21 How. Pr. 85.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, *Ornelas* v. *Ruiz*, 161 U. S. 502; *Terlinden* v. *Ames*, 184 U. S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offence within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offence was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin* v. *Shine*, 187 U. S. 181; *Tucker* v. *Alexandroff*, 183 U. S. 424.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 embodies that principle in terms. The offence must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offence under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429, and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute.

As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of

both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offence. There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon*, 127 U. S. 457.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases as they occur necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French mission: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore on Extradition, § 344; *United States* v. *Warr*, 28 Fed. Cas. 411.

So Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That in every treaty of extradition the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offences defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure as well with respect to the definition of crimes, as to the mode of procedure against criminals, and the manner and extent of punishment." Moore on Extradition, § 337 *n*.

In *Muller's* case, 5 Phila. 289, 292, the definition of the offence in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offence here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed as it was by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was

criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin* v. *Shine* we applied the definition of embezzlement given by the laws of California, but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress.

It is true that in the case of *Windsor*, 6 B. & S. 522, (1865,) a contrary view was expressed, but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offence of forgery in the third degree could not properly be regarded as extending the force of the treaty to offences not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offences made such only by the legislation of particular States of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the Circuit Court erred in denying the application to be let to bail.

By section 1015 of the Revised Statutes it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offence is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding sec-

tion to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offences against the United States. *Rice* v. *Ames*, 180 U. S. 371, 377. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. p. 91, c. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 provides that when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the District Court of Colorado in the case of *Carrier*, 57 Fed. Rep. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had on several occasions

been made to the Circuit Court, and that they had been uniformly denied.

In *Queen* v. *Spilsbury*, 2 Q. B. Div. (1898) 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act, and the distinction, existing ordinarily, between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that as matter of judicial discretion it ought not to be exercised in that case.

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

Order affirmed.

Ct will not hold that there
(1) must be statutory authorization for bail
(2) Ct can never grant bail.

Drey can in "special circumstances"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF PETER GABRIEL JOHN McMULLEN	)	MAGISTRATE NO. 3-78-1099 MG
	)	MEMORANDUM DECISION

Having denied extradition of Peter Gabriel John McMullen by an oral order made at the conclusion of argument on May 9, 1979, and having dismissed the extradition proceeding against Mr. McMullen, the Court is taking this means of setting forth in detail the facts and legal authorities which lead to our ruling that the defendant came within the political offense exclusion provided in Article V, 1 C(i) and (ii) of the extradition treaty between the United States and Great Britain.

At the outset, it must be stated that in ruling, we make no finding that the defendant would not be subject to extradition because of Treaty Article V, 2, which in this case, is the possibility of physical or mental mistreatment the defendant could suffer should he be incarcerated in a British prison in either England or Northern Ireland.

The government concedes that should the facts meet the requirements of the political offense in the treaty provisions, it is mandatory that the Court deny extradition.

This has been a unique extradition proceeding. It cannot be characterized as the usual type of extradition normally which has it source in either a bank embezzlement, robbery, extortion, fraud or murder, all absent political overtones.

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The background of this litigation could relate back to the early turn of this century and at least to the year 1921 when the conflict between the Irish people and Great Britain was partially resolved with the creation of the Republic of Ireland. Sporadically since 1921 and particularly in the decade commencing in 1970 the conflict, politically and nationalistic in concept and objective has flared and erupted between certain groups in Northern Ireland and Her Majesty's government. Not all the Ulster inhabitants seek freedom from British rule and unification with the Irish Free State. One organization within and without the borders of Northern Ireland has continued to press and to this day continues to fight for Northern Ireland's independence from British rule. This is the Provisional Irish Republican Army (PIRA) which has since 1970, engaged in various sorts of terrorist or guerrilla activities, covert in execution in its quest for nationalization of Northern Ireland.

The standards that must be established to bring what otherwise would be common law crime (e.g., murder) within the political offense exception of the treaty are two-fold. One, the act must have occurred during an uprising and the accused must be a member of the group participating in the uprising. Second, the accused must be a person engaged in acts of political violence with a political end. Although these are not the verbatim standards set out in the British decision of In Re Castioni, 1 QB, 148 (1891), they are, in essence, what is required to be proved by the accused in order to avoid extradition, where this treaty exception is asserted by way of defense. In Re Castioni, supra, was cited by the Ninth Circuit in 1957 in its decision of Karadzole v. Artukovic, 247 F.2d 198 in affirming a District Court decision denying extradition involving a World War II war crime. In Artukovic,

the Ninth Circuit speaking through Circuit Judge Stevens acknowledged that American courts have more or less adopted the standards of Castioni in political offense cases (pg. 203) The treaty provides the political character of an otherwise criminal offense for which extradition is sought must be so regarded or determined as such by the requested party, in this instance, the United States of America. We do not look to the Executive arm of the government, particularly the State Department for a determination as what this government considers as an act of political offense relative to criminal activity occurring on the soil of a foreign nation. Extradition is a judicial proceeding. The decisional law of the courts of the United States is the source in answering this question: "What is a crime of a political character"? The language in Artukovic is of assistance when it quotes Castioni as to what is a politically motivated crime. The political offense crime must be incidental to or formed as a part of a political disturbance and committed as furthering a political uprising. Even though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites.

Was there in 1974 a disturbance in Northern Ireland that meets the first of these steps? In executing a derogation with respect to the International Covenant in Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (Government Exhibit 4c) and (RT 10) the British government recognizes there existed a "public emergency" as defined in the Covenant due to violent civil disturbance or disruption concerning the United Kingdom's conduct of its affairs in Northern Ireland. The record in this case shows that highly placed officials in the British government made direct admissions that an insurrection was

occurring in Northern Ireland in 1970 and 1974.

Aside from these admissions by the British government of a public emergency or an insurrection existing in Northern Ireland, we cannot shut our eyes as to what has occurred in Northern Ireland since 1970 through 1979 with respect to the activities of PIRA in its insurgent and terrorist activities, seeking independence for the six counties that comprise Northern Ireland (Ulster). The PIRA's terrorist/ guerrilla activities were not and are not confined to these six counties, but extend to Great Britain. This, together with the presence of British troops in Northern Ireland since 1972, and the termination of Home Rule, leads the Court to the obvious inescapable conclusion that an insurrection and a disruptive uprising of a political nature did, in fact, existed in Northern Ireland in 1970 and particularly in 1974, when Mr. McMullen is charged with the crimes against Claro Barracks, a British Army installation. We find this necessary atmosphere or condition existed as one of the steps necessary in the application of the political exception defense. In Re Ezeta, 69 F.2d 972; Ramos v. Diaz, 179 F.Supp. 454.

The government attempts to brush aside McMullen's bombing barrack activities, in this era of insurrection, killing, bombing and other underground covert terrorist activities by the PIRA, as being personally motivated, hit and run and isolated from PIRA's terrorist campaign. The government further argues that there is no proof that on the date of McMullen's alleged crime there was any open activity by the PIRA against the British government. This argument is novel and totally unacceptable. Because PIRA guns may have been silent, that it did not throw nor ignited bombs on the day of McMullen's bombing, although they may have been very

active in terrorist conduct the day prior and the day after test the Court's credulity. A political disturbance, with terrorist activitiy spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain to further its cause of nationalism of Ulster on the day Claro Barracks were bombed.

The evidence in this case considering allegation of the British Government, in its complaint filed against the defendant, and the statement which McMullen gave to the New Scotland Yard in May 1977, irrefutably establishes the defendant was a member of the PIRA in 1974. At that time, he was a deserter from the British Army. The detachment from which he deserted took part in the Bloody Sunday firing in Derry in 1972.

Expert testimony, documentation, literature, and the reports and findings, international groups and organizations concerning civil rights which in the record clearly establish the PIRA in 1970 and in 1974 was a political terrorist organization with an objective of nationalizing Northern Ireland. No one disputes this. The proof before us more than adequately establish from British sources and defense evidence that prior to 1974 and in 1974, McMullen was a member of the PIRA, an organization existing in an era of political upheaval, which was engaged in and conducted political violence, of the most extreme nature with a solely political objective. The record is likewise well documented the British Army and its facilities were prime targets for the PIRA's guerrilla war fare. To say McMullen's activities in entering England, seeking out a British military barrack, clandestinely securing the necessary explosives to complete the bombing the premises and executing the bombing, was a

product of his own vengence or personal motivation free of any political consideration, is not supported by the record. We must reject the government's assumption or speculation that McMullen was solely, personally motivated in the bombing of the barracks. There is too much evidence to the contrary supportive of a finding that he acted as a member of PIRA, his activities were directed by persons in authority in the PIRA, and that the bombing was a crime incidental to and formed as part of a political disturbance, uprising or insurrection and in furtherance thereof.

With this evidence before us the burden shifts to the government to offer evidence that contradicts circumstances or activities which make the political exception applicable. Ramos v. Davis, supra. None was offered to meet this burden. The government suggests we disregard the testimony of Dr. Jeffrey Prager and Dr. Rona M. Fields, on the grounds that they were unqualified to give expert testimony on the subject of political offenses. The cross-examination of these two experts was brief and in no way discredited their expertise nor soiled their opinions regarding political offenses in Northern Ireland. We accept their opinions and conclusion.

We find that the defendant has established by evidence, which we most conclude as preponderating that the act of bombing the Claro Barracks was political in character. Thus, all the two requisites of establishing the political offense exception of the Treaty having been met, we find that Peter Gabriel John McMullen is therefore not extraditable under

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the provisions of the Extradition Treaty in force between the United States of America and the United Kingdom as of 1974.

DATED: May 11, 1979

FREDERICK J. WOELFLEY
United States Magistrate

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NO. OF COUNTRIES. 52

FOREIGN EXTRADITION REQUESTS*

"TOP (10)" COUNTRIES, 1979-1981**

1. CANADA (90 requests)
2. GERMANY-FRG (35 requests)
3. UNITED KINGDOM (27 requests)
4. ITALY (15 requests)
5. SWEDEN (9 requests)
6. FRANCE (7 requests)
7. ARGENTINA (6 requests)
8. MEXICO (5 requests)
9. PANAMA (4 requests)
10. ISRAEL, JAMAICA, DENMARK (3 requests each)

* Request = Fugitive

** (To 10-27-81)

Honduras	0	0	1	1
TOTAL	(76) ✓	(86) ✓	(78) ✓ →	= (240)

FOREIGN EXTRAD. REQUESTS

COUNTRY	1979	1980	198 (to 10-27-81)	3-YR TOTAL
Argentina *	1	5	0	6
Austria	1	0	1	2
Canada *	36	27	27	90
Ecuador *	1	1	0	2
France	1	2	4	7
Germany	12	9	14	35
Greece	1	3	0	4
Grenada *	1	0	0	1
Holland	1	0	1	2
India	1	0	0	1
Israel *	1	1	1	3
Italy	1	9	5	15
Jamaica *	3	0	0	3
Japan	1	0	0	1
Liberia	1	0	0	1
Mexico *	2	3	0	5
New Zealand	1	1	0	2
Panama *	1	0	1	2
Spain	1	1	2	4
Sweden	1	5	3	9
Switzerland	2	0	0	2
Turkey	1	0	0	1
U.S.S.R.	3	17	7	27
Yugoslavia	1	0	1	2
Netherlands	0	1	1	2
Portugal	0	1	0	1
Bahamas *	0	0	2	2
Belgium	0	0	1	1
Chile *	0	0	2	2
Denmark	0	0	3	3
El Salvador *	0	0	1	1
Honduras *	0	0	1	1
TOTAL	96 ✓	86 ✓	78 ✓ → =	240

NO. OF COUNTRIES: 61 *

10-27-81

U.S./STATE EXTRADITION REQUESTS** (COMBINED)

"TOP (10) COUNTRIES TO WHICH U.S. & STATES (COMBINED) MADE REQUESTS, 1979-1981***

1. CANADA (89 requests)
2. UNITED KINGDOM (33 requests)
3. COSTA RICA (14 requests)
4. Germany (12 requests)
5. Italy, Mexico, Jamaica, Haiti (11 requests each)
6. Bahamas (9 requests)
7. France (8 requests)
8. Switzerland, Brazil, Netherlands, Cuba (7 requests each)
9. Israel (6 requests)
10. Guatemala (5 requests)

* No State requests in 1979.
** Request = inquiries
*** To 10-27-81

(Continued)

61 Countries — COMBINED U.S. / STATE STATISTICS — 10-27-81

COUNTRY	U.S. 1979	U.S. 1980	U.S. 1981	U.S. T	STATE 1979	STATE 1980	STATE 1981	STATE T	U.S./State Combined TOTAL (3 YRS.)
ITALY	6	3	0	(9)	NO STATE ENQUIRIES IN 1979	1	1	(2)	(11)
UK	9	10	9	(28)	—	4	1	(5)	(33)
Thailand	1	0	1	(2)	—	1	0	(1)	(3)
Niger	1	1	1	(3)	—	0	0	(0)	(3)
France	2	5	0	(7)	—	0	1	(1)	(8)
Rhodesia	1	0	0	(1)	—	0	0	(0)	(1)
Switzerland	1	3	2	(6)	—	1	0	(1)	(7)
* Canada	11	18	15	(44)	—	20	25	(45)	(89)
* Mexico	2	1	1	(4)	—	3	4	(7)	(11)
* Venezuela	1	0	0	(1)	—	0	0	(0)	(1)
* Costa Rica	2	1	6	(9)	—	2	3	(5)	(14)
* Colombia	2	1	1	(4)	—	0	0	(0)	(4)
Taiwan	1	0	0	(1)	—	0	0	(0)	(1)
* Bahamas	1	0	3	(4)	—	5	0	(5)	(9)
Cyprus	1	0	0	(1)	—	0	0	(0)	(1)
* Brazil	1	2	4	(7)	—	0	0	(0)	(7)
W. Indies	1	3	3	(7)	—	0	0	(0)	(7)
Belgium	1	1	0	(2)	—	0	0	(0)	(2)
Australia	1	2	0	(3)	—	0	1	(1)	(4)
Spain	1	0	2	(3)	—	0	1	(1)	(4)
Sweden	1	1	0	(2)	—	0	0	(0)	(2)
Paraguay	2	0	0	(2)	—	1	0	(1)	(3)
Germany	3	1	3	(7)	—	2	3	(5)	(12)
* Peru	1	6	0	(7)	—	0	0	(0)	(7)
* Argentina	0	1	0	(1)	—	1	0	(1)	(2)
Japan	0	1	0	(1)	—	1	1	(2)	(3)
* Barbados	0	1	0	(1)	—	0	0	(0)	(1)
S. Korea	0	2	0	(2)	—	0	0	(0)	(2)
Turkey	0	1	0	(1)	—	0	0	(0)	(1)
* Trin. & Tob.	0	1	0	(1)	—	0	0	(0)	(1)
Kuwait	0	2	0	(2)	—	0	0	(0)	(2)
Yemen	0	1	0	(1)	—	0	0	(0)	(1)
PRC	0	1	0	(1)	—	0	0	(0)	(1)
* Jamaica	0	1	1	(2)	—	1	8	(9)	(11)

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COMBINED U.S. / STATE STATISTICS 10-27-81

COUNTRY	U.S. 1979	U.S. 1980	U.S. 1981	U.S. 1981 I	STATE 1979	STATE 1980	STATE 1981	STATE 1981 I	OBSERVED TOTAL
Jamaica	0	1	0	(1)	—	0	0	(0)	(1)
Israel	0	2	1	(3)	—	1	2	(3)	(6)
Guatemala	0	2	2	(4)	—	0	1	(1)	(5)
Georgia	0	1	1	(2)	—	0	0	(0)	(2)
Haiti	0	1	9	(10)	—	1	0	(1)	(11)
Greece	0	1	1	(2)	—	1	0	(1)	(3)
Egypt	0	1	0	(1)	—	0	0	(0)	(1)
El Salvador	0	1	0	(1)	—	0	1	(1)	(2)
Portugal	0	1	0	(1)	—	1	0	(1)	(2)
Burundi	0	0	1	(1)	—	0	0	(0)	(1)
Syria	0	0	1	(1)	—	0	0	(0)	(1)
Indonesia	0	0	1	(1)	—	0	0	(0)	(1)
Dominican R.	0	0	3	(3)	—	0	0	(0)	(3)
Denmark	0	0	1	(1)	—	0	0	(0)	(1)
Chile	0	0	1	(1)	—	0	0	(0)	(1)
Guinea	0	0	2	(2)	—	0	0	(0)	(2)
S. Arabia	0	0	0	(0)	—	2	0	(2)	(2)
Panama	0	0	0	(0)	—	2	1	(3)	(3)
S. Africa	0	0	0	(0)	—	1	0	(1)	(1)
Malaysia	0	0	0	(0)	—	1	0	(1)	(1)
Austria	0	0	0	(0)	—	1	0	(1)	(1)
Iraq	0	0	0	(0)	—	1	0	(1)	(1)
Portugal	0	0	0	(0)	—	2	0	(2)	(2)
Norway	0	0	0	(0)	—	0	1	(1)	(1)
Yugoslavia	0	0	0	(0)	—	0	1	(1)	(1)
Taiwan	0	0	0	(0)	—	0	1	(1)	(1)
Tanzania	0	0	0	(0)	—	0	4	(4)	(4)

(88)

COUNTRIES WITH WHICH THE UNITED STATES HAS EXTRADITION TREATIES

AS OF SEPTEMBER 1, 1981

ALBANIA

Treaty of extradition.
Signed at Tirana March 1, 1933; entered into force November 14, 1935.
49 Stat. 3313; TS 902; 5 Bevans 22; 166 LNTS 195.

ARGENTINA

Treaty on extradition.[1]
Signed at Washington January 21, 1972; entered into force September 15, 1972
23 UST 3501; TIAS 7510.

AUSTRALIA

Treaty on extradition.[1]
Signed at Washington May 14, 1974.
Entered into force May 8, 1976.
27 UST 957; TIAS 8234.

AUSTRIA

Treaty for the extradition of fugitives from justice, and exchange of notes concerning the death penalty.
Signed at Vienna January 31, 1930; entered into force September 11, 1930.
46 Stat. 2779; TS 822; 5 Bevans 358; 106 LNTS 379.

Supplementary extradition convention.
Signed at Vienna May 19, 1934; entered into force September 5, 1934.
49 Stat. 2710; TS 873; 5 Bevans 378; 153 LNTS 247.

BAHAMAS

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

Agreement continuing in force between the United States and The Bahamas the extradition treaty of December 22, 1931 (47 Stat. 2122) between the United States and the United Kingdom. Exchange of notes at Nassau and Washington March 7, June 19 and August 17, 1978.
TIAS 9185.

BARBADOS

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

BELGIUM

Treaty for the mutual extradition of fugitives from justice. Signed at Washington October 26, 1901 ; entered into force July 14, 1902.
32 Stat. 1894; TS 409; 5 Bevans 508.

Supplementary extradition convention.
Signed at Washington June 20, 1935; entered into force November 7, 1935.
49 Stat. 3276; TS 900; 5 Bevans 566; 164 LNTS 205.

Supplementary extradition convention.
Signed at Brussels November 14, 1963; entered into force December 25, 1964.
15 UST 2252; TIAS 5715; 522 UNTS 237.

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[1] Applicable to all territories.

BOLIVIA

Treaty of extradition.
Signed at La Paz April 21, 1900; entered into force January 22, 1902.
32 Stat. 1857; TS 399; 5 Bevans 735.

BRAZIL

Treaty of extradition.
Signed at Rio de Janeiro January 13, 1961; entered into force December 17, 1964.
15 UST 2093; TIAS 5691; 532 UNTS 177.

Additional protocol to the treaty of extradition.
Signed at Rio de Janeiro June 18, 1962; entered into force December 17, 1964.
15 UST 2112; TIAS 5691; 532 UNTS 198.

BULGARIA

Extradition treaty.
Signed at Sofia March 19, 1924; entered into force June 24, 1924.
43 Stat. 1886; TS 687; 5 Bevans 1086; 26 LNTS 27.

Supplementary extradition treaty.
Signed at Washington June 8, 1934; entered into force August 15, 1935.
49 Stat. 3250; TS 894; 5 Bevans 1103; 161 LNTS 409.

BURMA

Extradition treaty between the United States and the United Kingdom, signed at London December 22, 1931, made applicable to Burma from November 1, 1941.
47 Stat. 2122; TS 849; IV Trenwith 4274; 163 LNTS 59.

CANADA

Treaty on extradition, with schedule.[1]
Signed at Washington December 3, 1971.
Entered into force March 22, 1976.
27 UST 983; TIAS 8237.

Agreement amending the treaty on extradition of December 3, 1971.
Effected by exchange of notes at Washington June 28 and July 9, 1974; entered into force March 22, 1976.
TIAS 8237.

CHILE

Treaty providing for the extradition of criminals.
Signed at Santiago April 17, 1900; entered into force June 26, 1902.
32 Stat. 1850; TS 407; 6 Bevans 543.

COLOMBIA

Convention for the reciprocal extradition of criminals. Signed at Bogotá May 7, 1888; entered into force January 11, 1891.
26 Stat. 1534; TS 58; 6 Bevans 895; 125 UNTS 239.

Supplementary convention of extradition signed at Bogotá September 9, 1940; entered into force July 6, 1943.
57 Stat. 824; TS 986; 6 Bevans 932; 125 UNTS 248.

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[1] Applicable to all territories.

CONGO (Brazzaville) 15

Extradition convention between the United States and France.
Signed at Paris January 6, 1909; entered into force July 27, 1911.
37 Stat. 1526; TS 561; 7 Bevans 872.

Supplementary extradition convention between the United States and France.
Signed at Paris January 15, 1929; entered into force May 19, 1929.
46 Stat. 2276; TS 787; 7 Bevans 972; 92 LNTS 259.

Supplementary extradition convention between the United States and France.
Signed at Paris April 23, 1936; entered into force September 24, 1936.
50 Stat. 1117; TS 909; 7 Bevans 995; 172 LNTS 197.

COSTA RICA 16

Treaty of extradition and exchange of notes concerning the death penalty.
Signed at San José November 10, 1922; entered into force April 27, 1923.
43 Stat. 1621; TS 668; 6 Bevans 1033.

CUBA 17

Treaty providing for the mutual extradition of fugitives from justice. Signed at Washington April 6, 1904; entered into force March 2, 1905. 33 Stat. 2265; TS 440; 6 Bevans 1125.

Protocol amending Spanish text of extradition treaty signed April 6, 1904.
Signed at Washington December 6, 1904; entered into force March 2, 1905.
33 Stat. 2273; TS 441; 6 Bevans 1134.

Additional extradition treaty. Signed at Habana January 14, 1926; entered into force June 18, 1926. 44 Stat. 2392; TS 737; 6 Bevans 1136; 61 LNTS 363.

CYPRUS 18

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; made applicable to Cyprus June 24, 1935.
47 Stat. 2122; TS 849; IV Trenwith 4274; 163 LNTS 59.

CZECHOSLOVAKIA 19

Treaty concerning the mutual extradition of fugitive criminals.
Signed at Prague July 2, 1925; entered into force March 29, 1926.
44 Stat. 2367; TS 734; 6 Bevans 1247; 50 LNTS 143.

Supplementary extradition treaty.
Signed at Washington April 29, 1935; entered into force August 28, 1935.
49 Stat. 3253; TS 895; 6 Bevans 1283; 162 LNTS 83.

DENMARK 20

Treaty on extradition.[1]
Signed at Copenhagen June 22, 1972; entered into force July 31, 1974.
25 UST 1293; TIAS 7864.

DOMINICAN REPUBLIC 21

Convention for the mutual extradition of fugitives from justice.
Signed at Santo Domingo June 19, 1909; entered into force August 2, 1910.
36 Stat. 2468; TS 550; 7 Bevans 200.

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1 Applicable to all territories.

ECUADOR 22

Extradition treaty.
Signed at Quito June 28, 1872; entered into force November 12, 1873.
18 Stat. 199; TS 79; 7 Bevans 321.

Supplementary extradition treaty.
Signed at Quito September 22, 1939; entered into force May 29, 1941.
55 Stat. 1196; TS 972; 7 Bevans 346.

EGYPT 23

(Formerly UNITED ARAB REPUBLIC)

Convention between the United States and the Ottoman Empire relating to extradition.
Signed at Constantinople August 11, 1874; entered into force April 22, 1875.
19 Stat. 572; TS 270; 10 Bevans 642.

EL SALVADOR 24

Treaty of extradition.
Signed at San Salvador April 18, 1911; entered into force July 10, 1911.
37 Stat. 1516; TS 560; 7 Bevans 507.

ESTONIA 25

The United States has not recognized the incorporation of Estonia, Latvia, and Lithuania into the Union of Soviet Socialist Republics. The Department of State regards treaties between the United States and those countries as continuing in force.

Treaty for the extradition of fugitives from justice.
Signed at Tallinn November 8, 1923; entered into force November 15, 1924.
43 Stat. 1849; TS 703; 7 Bevans 692; 43 LNTS 277.

Supplementary extradition treaty.
Signed at Washington October 10, 1934; entered into force May 7, 1935.
49 Stat. 3190; TS 888; 7 Bevans 645; 159 LNTS 149.

FIJI 26

Extradition treaty.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; IV Trenwith 4274; 163 LNTS 59.

Agreement continuing in force between the United States and Fiji the extradition treaty of December 22, 1931 (47 Stat. 2122) between the United States and the United Kingdom.
Exchange of notes at Suva and Washington July 14, 1972 and August 17, 1973; entered into force August 17, 1973.
TIAS 7707.

FINLAND 27

Extradition treaty.
Signed at Helsinki June 11, 1976.
Entered into force May 11, 1980.
TIAS 9626.

FRANCE 28

Extradition convention.[1]
Signed at Paris January 6, 1909; entered into force July 27, 1911.
37 Stat. 1526; TS 561; 7 Bevans 872.

Supplementary extradition convention with exchanges of letters.[1]
Signed at Paris February 12, 1970; entered into force April 3, 1971.
22 UST 407; TIAS 7075.

[1] Applicable to all territories.

GAMBIA 29

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 163 LNTS 59.

GERMANY 30

FI[illegible]
Extradition treaty.
Signed at Berlin July 12, 1930; entered into force April 26, 1931.

Treaty concerning extradition, with protocol. Signed at Bonn June 20, 1978. Entered in to force August 29, 1980.

GHANA 31

Extredition treaty between the United States and the United Kingdom.
Signed at London Decrmber 22, 1931; made applicable to the Gold Coast June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

GREECE 32

Treaty of extradition, and exchange of notes.
Signed at Athens May 6, 1931; entered into force November 1, 1932.
47 Stat. 2185; TS 855; 8 Bevans 353; 138 LNTS 293.

Protocol interpreting art. 1 of the treaty of extradition signed at Athens May 6, 1931.
Signed at Athens September 2, 1937; entered into force September 2, 1937.
51 Stat. 357; EAS 114; 8 Bevans 366; 185 LNTS 408.

GRENADA 33

Extradition treaty between the United States and the United Kingdom. Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

GUATEMALA 34

Treaty for the mutual extradition of fugitives from justice.
Signed at Washington February 27, 1903; entered into force August 15, 1903.
33 Stat. 2147; TS 425; 8 Bevans 482.

Supplementary extradition convention.
Signed at Guatemala February 20, 1940; entered into force March 13, 1941.
55 Stat. [illegible] 8 Bevans 528.

GUYANA 35

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1933.
47 Stat. 2122; TS 849; 1V Trenwith 4274; 163 LNTS 39.

HAITI 36

Treaty for the mutual extradition of criminals.
Signed at Washingtoo August 9, 1904; entered into force June 28, 1903.
34 Stat. 2858; TS 447; 8 Bevans 653.

HONDURAS 37

Treaty for the extradition of fugitives from justice.
Signed at Washiogton January 13, 1909; entered into force July 10, 1912.
37 Stat. 1616; TS 569; 8 Bevans 892.

Supplementary extradition convention.
Signed at Tegucigalpa February 21, 1927; entered into force June 3, 1928.
45 Stat. 2489; TS 761; 8 Bevans 903; 85 LNTS 491.

HUNGARY 38

Convention for the mutual delivery of criminals, fugitives from justice, in certain cases.
Signed at Washington July 3, 1856; entered into force December 13, 1836.
11 Stat. 691; TS 9; 5 Bevans 211.

ICELAND 39

Conveotions between the United States and Denmark applicable to Iceland:

Treaty for the extradition of fugitives from justice signed at Washington January 6, 1902 (32 Stat. 1906; TS 405; 7 Bevans 38); Supplementary treaty for the extradition of criminals signed at Washington November 6, 1905 (34 Stat. 2887; TS 449; 7 Bevans 43); entered into force for Iceland February 19, 1906.

INDIA 40

Extradition treaty between the United States and Great Britain, signed at London December 22, 1931, made applicable to India in accordance with art. 14 from March 9, 1942. 47 Stat. 2122; TS 849; IV Trenwith 4274; 163 LNTS 59.

IRAQ 41

Extradition treaty.
Signed at Baghdad June 7, 1934;
entered into force April 23, 1936.
49 Stat. 3380; TS 907; 9 Bevans 1;
170 LNTS 267.

IRELAND 42

Conventions between the United States and the United Kingdom applicable to Ireland; Extradition convention signed at Washington July 12, 1889 (26 Stat. 1508; TS 139; 1 Malloy 740).

Supplementary extradition convention signed at Washington December 13, 1900. (32 Stat. 1864; TS 391; I Malloy 780).

Supplementary extradition convention signed at London April 12, 1905. (34 Stat. 2903; TS 458; I Malloy 798).

Art. 10 of treaty of August 9, 1842. (Webster-Ashburton Treaty) (8 Stat. 572; TS 119; I Malloy 650).

ISRAEL 43

Convention relating to extradition.
Signed at Washington December 10, 1962;
entered into force December 5, 1963.
14 UST 1707; TIAS 5476; 484 UNTS 283.

Understanding regarding certain errors in the translation of the Hebrew text of the extradition convention of December 10, 1962 (TIAS 5476).

ISRAEL (cont'd)

Exchange of notes at Jerusalem and Tel Aviv April 4 and 11, 1967;
entered into force April 11, 1967.
18 UST 382; TIAS 6246.

ITALY 44

Treaty on extradition.
Signed at Rome January 18, 1973;
entered into force March 11, 1975.
TIAS 8052.

JAMAICA 45

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931;
applicable to Jamaica June 24, 1935.
47 Stat. 2122; TS 849; IV Trenwith 4274; 163 LNTS 59.

JAPAN 46

Treaty on extradition.
Signed at Tokyo March 3, 1978.
Entered into force March 26, 1980.
TIAS 9625.

KENYA 47

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931;
applicable to Kenya June 24, 1935.
47 Stat. 2122; TS 849; 163 LNTS 59.

Agreement to continue in force between the United States and Kenya the extradition treaty of December 22 1931 between the United States and the United Kingdom. Exchange of notes at Nairobi May 14 and August 19, 1965;
entered into force August 19, 1965.
16 UST 1866; TIAS 5916; 574 UNTS 153

KIRIBATI 48

Extradition treaty between the United States and the United Kingdom with protocol of signature and exchange of notes. Signed at London June 8, 1972; entered into force January 21, 1977.
28 UST 227; TIAS 8468.

LATVIA 49

The United States has not recognized the incorporation of Estonia, Latvia, and Lithuania into the Union of Soviet Socialist Republics. The Department of State regards treaties between the United States and those countries as continuing in force.

Treaty of extradition.
Signed at Riga October 16, 1923; entered into force March 1, 1924.
43 Stat. 1738; TS 677; 9 Bevans 515; 27 LNTS 371.

Supplementary extradition treaty.
Signed at Washington October 10, 1934; entered into force March 29, 1935.
49 Stat. 3131; TS 884; 9 Bevans 554; 158 LNTS 263.

LESOTHO 50

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

LIBERIA 51

Treaty of extradition.
Signed at Monrovia November 1, 1937; entered intoforce November 21, 1939.
54 Stat. 1733; TS 955; 9 Bevans 589; 201 LNTS 151.

LIECHTENSTEIN 52

Extradition treaty.
Signed at Bern May 20, 1936; entered into force June 28, 1937.
50 Stat. 1337; TS 915; 9 Bevans 648; 183 LNTS 181.

LITHUANIA 53

The United States has not recognized the incorporation of Estonia, Latvia, and Lithuania into the Union of Soviet Socialist Republics. The Department of State regards treaties between the United States and those countries as continuing in force.

Treaty of extradition.
Signed at Kaunas April 9, 1924; entered into force August 23, 1924.
43 Stat. 1835; TS 699; 9 Bevans 655; 51 LNTS 191.

Supplementary extradition treaty.
Signed at Washington May 17, 1934; entered into force January 8, 1935.
49 Stat. 3077; TS 879; 9 Bevans 683; 157 LNTS 441.

LUXEMBOURG 54

Treaty of extradition.
Signed at Berlin October 29, 1883; entered into force August 13, 1884.
23 Stat. 808; TS 196; 9 Bevans 694.

Supplementary extradition convention.
Signed at Luxembourg April 24, 1935; entered into force March 3, 1936.
49 Stat. 3355; TS 904; 9 Bevans 707; 168 LNTS 129.

MALAWI 55

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; applicable to Nyasaland June 24, 1935.
47 Stat. 2122; TS 849; 1V Trenwith 4274; 163 LNTS 59.

Agreement continuing in force between the United States and Malawi the extradition treaty and the double taxation convention between the United States and the United Kingdom. Exchange of notes at Zomba and Blantyre December 17, 1966, January 6 and April 4, 1967; entered into force April 4, 1967.
18 UST 1822; TIAS 6328.

MALAYSIA 51

Extradition treaty batwaen tha United Stetes and the Unitad Kingdom.[1]
Signed at London December 22, 1931.
47 Stat. 2122; TS 849; IV Tranwith 4274; 163 LNTS 59.

[1]Notification given on August 10, 1939 of application to tha Faderated and Unfaderated Maley Statas.

MALTA 57

Extradition treaty between the United States and tha United Kingdom.
Signad at London December 22, 1931; applicabla to Malta June 24, 1935.
47 Stat. 2122; TS 849; 12 Bavans 482; 163 UNTS 59.

MAURITIUS 58

Extradition traaty between tha Unitad Stetas and tha United Kingdom.
Signed at London Decembar 22, 1931; entarad into force June 24, 1935.
47 Stat. 2122; TS 849; 163 LNTS 59.

MEXICO 59

Extradition treaty, with appendix.* * Signed at Mexico May 4, 1978; entars into force January 25, 1980.
TIAS 9656.

*Tha traaty applies to offenses committed before and after January 25, 1980. Requests for extradition that are under process on January 25, 1980 shall be resolved in accordance with the provisions of the extradition treaty of February 22, 1899 (31 Stat. 1818) and the additional conventions of June 25, 1902 (TS 421), December 23, 1925 (44 Stat. 2409), and August 16, 1939 (55 Stat. 1133).

MONACO 60

Extradition treaty. Signed at Monaco February 15, 1939; entered into force March 28, 1960.
50 Stat. 1780; TS 959; 9 Bevans 1272;
202 LNTS 61.

NAURU 61

Extradition treaty between the United States and the United Kingdom, signad at London December 22, 1931;made applicable to Anstrelia (including Papua, Norfolk Island, and the mandatad territories of Naw Guinea and Nauru), in accordance witb art. 14, from August 30, 1935.
47 Stat. 2122; TS 849; 12 Bavens 482; 163 LNTS 59.

NETHERLANDS 62

Convention for tba extradition of criminals. Signed at Washington June 2, 1887; entered into force July 11, 1889. 26 Stat. 1481; TS 256; 10 Bevans 47.

Treaty extanding tha extredition convention of June 2, 1887, between th two countrias to their respective island possessions and colonias. Signed at Washington January 18, 1904; antarad into force August 28, 1904; 33 Stat. 2257; TS 436; 10 Bevans 53.

NEW ZEALAND 63

Treaty on extradition.[1]
Signed at Washington January 12, 1970; entered into force December 8, 1970. 22 UST 1; TIAS 7035.

NICARAGUA 64

Treaty for tha extradition of criminals. Signed at Washington March 1, 1905; entered into forca July 14, 1907. 35 Stat. 1869; TS 462; 10 Bevans 356.

[1] Applicebla to all tarritories.

NIGERIA 65

Extradition treaty between the United States and the United Kingdom. Signed at London December 22, 1931; made applicable to Nigeria June 24, 1935. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

NORWAY 66

Extradition treaty. Signed at Oslo June 9, 1977; Entered into force March 7, 1980. TIAS 9679.

PAKISTAN 67

The Schedule to the Independence (International Arrangements) Order, 1947, provides that rights and obligations under all international agreements to which India is a party immediately before the appointed day (August 15, 1947) devolve upon India and Pakistan and will, if necessary, be apportioned between them; except that (1) Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join, and (2) rights and obligations under international agreements having an exclusive application to an area comprised in the Dominion of Pakistan will devolve upon it.

Extradition treaty between the United States and the United Kingdom, signed at London December 22, 1931, made applicable to India, in accordance with the provisions of art. 14 from March 9, 1942. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

PANAMA 68

Treaty providing for the extradition of criminals. Signed at Panama May 25, 1904; entered into force May 8, 1905. 34 Stat. 2851; TS 445; 10 Bevans 673. (See also article XVI of 1903 canal convention).

69

PAPUA NEW GUINEA *

On September 16, 1975 Papua New Guinea became an independent state. In a note dated September 16, 1975 to the Secretary-General of the United Nations, the Governor-General made a statement reading in part as follows:

"1. The Government of Papua New Guinea will make an examination of all treaties applying to its territory before independence, both bilateral and multilateral, with a view to making a statement of intention in respect of each of them. The statement will declare the Government's view as to whether the treaty continues or should be continued in force (on the basis of either succession or mutual consent, and with or without modification), or should be treated as having lapsed, or should be terminated. The statement will be forwarded to the other party or parties or to the depositary, as may be appropriate.

"2. During the period of examination, the Government will, on a basis of reciprocity, accept all treaty rights and obligations accruing and arising under treaties previously applicable. The period of examination will extend for five years from the date of Independence, that is, until 15th September, 1980, except in the case of any treaty in respect of which an earlier statement of intention is made."

Extradition treaty between the United States and the United Kingdom, signed at London December 22, 1931, made applicable to Australia (including Papua, Norfolk Island, and the mandated territories of New Guinea and Nauru), in accordance with art. 14, from August 30, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

PARAGUAY 70

Treaty on extradition. Signed at Asuncion May 24, 1973; entered into force May 7, 1974. TIAS 7838.
25 UST 967.

PERU 61

Treaty providing for the extradition of criminals.
Signed at Lima November 28, 1899; entered into force February 22, 1901.
31 Stat. 1921; TS 288; 10 Bevans 1074.

POLAND 62

Extradition treaty and accompanying protocol. Signed at Warsaw November 22, 1927; entered into force July 6, 1929. 46 Stat. 2282; TS 789; 11 Bevans 206; 92 LNTS 101.

Supplementary extradition treaty.
Signed at Warsaw April 5, 1935; entered into force June 5, 1936.
49 Stat. 3394; TS 908; 11 Bevans 265; 170 LNTS 287.

PORTUGAL 63

Extradition convention and exchange of notes concerning the death penalty.[1]
Signed at Washington May 7, 1908; entered into force November 14, 1908.
35 Stat. 2071; TS 512; 11 Bevans 314.

[1] Applicable to all territories.

ROMANIA 64

Extradition treaty.
Signed at Bucharest July 23, 1924; entered into force April 7, 1925.
44 Stat. 2020; TS 713; 11 Bevans 391.

Supplementary extradition treaty.
Signed at Bucharest November 10, 1936; entered into force July 27, 1937.
50 Stat. 1349; TS 916; 11 Bevans 423; 181 LNTS 177.

SAINT LUCIA 65

Extradition treaty between the United States and the United Kingdom with protocol of signature and exchange of notes. Signed at London June 8, 1972; entered into force January 21, 1977. 28 UST 227. TIAS 8648.

SAN MARINO 66

Treaty for mutual extradition of fugitive criminals. Signed at Rome January 10, 1906; entered into force July 8, 1908. 35 Stat. 1971; TS 493; 11 Bevans 440.

Supplementary extradition convention.
Signed at Washington October 10, 1934 entered into force June 28, 1935.
49 Stat. 3198; TS 891; 11 Bevans 446; 161 LNTS 149.

SEYCHELLES 67

Extradition treaty between the United States and the United Kingdom. Signed at London December 22, 1931; applicable to Seychelles June 24, 1935. 47 Stat. 2122. TS 849.

SIERRA LEONE 68

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; made applicable to Sierra Leone June 24, 1935. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

SINGAPORE 69

Extradition treaty between the United States and the United Kingdom. Signed at London December 22, 1931; entered into force June 24, 1935. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

Agreement confirming the continuance in force between the United States and Singapore of the December 22, 1931 extradition treaty between the United States and the United Kingdom. Exchange of notes at Singapore April 23 and June 10, 1969; entered into force June 10, 1969. 20 UST 2764; TIAS 6744.

SOLOMON ISLANDS 70

Extradition treaty between the United States and the United Kingdom, with protocol of signature and exchange of notes. Signed at London June 8, 1972; applicable to Solomon Islands January 21, 1977. 28 UST 277; TIAS 8468.

SOUTH AFRICA 71

Treaty relating to the reciprocal extradition of criminals.[1] Signed at Washington December 18, 1947; entered into force April 30, 1951. 2 UST 884; TIAS 2243; 148 UNTS 85.

[1] Applicable to all territories.

SPAIN 72

Treaty on extradition.[1] Signed at Madrid May 29, 1970; entered into force June 16, 1971. 22 UST 737; TIAS 7136.

Supplementary treaty on extradition. Signed at Madrid January 25, 1975; entered into force June 2, 1978. TIAS 8938.

SRI LANKA (Formerly Ceylon) 73

Extradition treaty between the United States and the United Kingdom, signed at London December 22, 1931, made applicable to Ceylon June 24, 1935. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

SURINAME 74

On November 25, 1975 Suriname became an independent state. In a note dated November 29, 1975 to the Secretary-General of the United Nations, the Prime Minister made a statement reading in part as follows:

"The Government of the Republic of Suriname, conscious of the desirability of maintaining existing legal relationship, and conscious of its obligation under International Law to honour its treaty commitments, acknowledges that treaty rights and obligations of the Government of the Kingdom of the Netherlands in respect of Suriname were succeeded by the Republic of Suriname upon Independence by virtue of customary International Law.

"Since, however, it is likely that by virtue of customary International Law certain treaties may have lapsed at the date of Independence of Suriname, it seems essential that each treaty should be subjected to legal examination. It is proposed after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary International Law the Government of the Republic of Suriname wish to treat as having lapsed.

"It is desired that it be presumed that each treaty has been legally succeeded to by the Republic of Suriname and that action be based upon this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of the Republic of Suriname be of the opinion it has legally succeeded to a treaty but subsequently wish to terminate its operation, the Government will in due course give notice of termination in the terms thereof."

(Con't on back)

Convention between the United States and the Netherlands for the extradition of criminals. Signed at Washington June 2, 1887; entered into force July 11, 1889.
26 Stat. 1481; TS 256; 10 Bevans 47.

Treaty extending the extradition convention of June 2, 1887, between the United States and the Netherlands to their respective island possessions and colonies. Signed at Washington January 18, 1904; entered into force August 28, 1904.
33 Stat. 2257; TS 436; 10 Bevans 53.

SWAZILAND 75

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

Agreement continuing in force between the United States and Swaziland the extradition treaty of December 22, 1931 (47 Stat. 2122), between the United States and the United Kingdom.
Exchange of notes at Mbabane May 13 and July 28, 1970; entered into force July 28, 1970.
21 UST 1930; TIAS 6934. 756 UNTS 103

SWEDEN 76

Convention on extradition, with protocol.[1]
Signed at Washington October 24, 1961; entered into force December 3, 1963.
14 UST 1845; TIAS 5496; 494 UNTS 141.

[1]Protocol terminated January 1, 1965.

SWITZERLAND 77

Extradition treaty.
Signed at Washington May 14, 1900; entered into force March 29, 1901.
31 Stat. 1928; TS 354; 11 Bevans 904.

Supplementary extradition treaty.
Signed at Washington January 10, 1935; entered into force May 16, 1935.
49 Stat. 3192; TS 889; 11 Bevans 924; 159 LNTS 243.

Supplementary extradition treaty.
Signed at Bern January 31, 1940; entered into force April 8, 1941.
55 Stat. 1140; TS 969; 11 Bevans 938.

TANZANIA 78

Extradition treaty between the United States and the United Kingdom.[1]
Signed at London December 22, 1931; entered into force June 24, 1935. 47 Stat. 2122; TS 849; 12 Bevans 482; 163 UNTS 59.

[1]Treaty continued in force between the United States and Tanzania by the exchange of notes of November 30 and December 6, 1965 (16 UST 2066; TIAS 5946).

TANZANIA (cont'd)

Agreement continuing in force between the United States and Tanzania the extradition treaty and the consular convention between the United States and the United Kingdom.
Exchange of notes at Dar-es-Salaam November 30 and December 6, 1965; entered into force December 6, 1965; effective December 9, 1963. 16 UST 2066; TIAS 5946; 592 UNTS 53.

THAILAND 79

Treaty for the extradition of fugitives from justice. Signed at Bangkok December 30, 1922; entered into force March 24, 1924.
43 Stat. 1749; TS 681; 11 Bevans 1008; 25 LNTS 394.

TONGA 80

Extradition treaty between the United States and the United Kingdom.
Signed at London December 22, 1931; entered into force June 24, 1935; made applicable to Tonga August 1, 1966. 47 Stat. 2122; TS 849; 12 Bevans 482; ; 163 LNTS 59.

Agreement continuing in force between the United States and Tonga the extradition treaty of December 22, 1931 between the United States and the United Kingdom. Exchange of notes at Nukualofa and Wellington. March 14 and April 13, 1977; entered into force April 13, 1977. 28 UST 5290. TIAS 8628.

TRINIDAD AND TOBAGO 81

Extradition treaty between the United States and the United Kingdom
Signed at London December 22, 1931; applicable to Trinidad and Tobago June 24, 1935. 47 Stat. 2122; TS 84; IV Trenwith 4274; 163 LNTS 59.

TURKEY 82

Treaty on extradition and mutual assistance in criminal matters. Signed at Ankara June 7, 1979. Entered into force January 1, 1981.

TUVALU 83

Extradition treaty between the United States and the United Kingdom, with protocol of signature and exchange of notes. Signed at London June 8, 1972; entered into force January 21, 1977. 28 UST 227; TIAS 8468.

UNITED KINGDOM 84

Extradition treaty, with protocol of signature and exchange of notes.[1] Signed at London June 8, 1972; entered into force January 21, 1977. 28 UST 227; TIAS 8468.
Applicable to: all U.S. territories; Channel Islands, Isle of Man, Antigua, Belize, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Christopher, Nevis and Anguilla, St. Helena and Dependencies, Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus, Turks and Caicos Islands.

URUGUAY 85

Extradition treaty.
Signed at Washington March 11, 1905; entered into force June 4, 1908.
35 Stat. 2028; TS 501; 12 Bevans 979.

VENEZUELA 86

Treaty of extradition, and additional article. Signed at Caracas January 19 and 21, 1922; entered into force April 14, 1923. 43 Stat. 1698; TS 675; 12 Bevans 1128; 49 LNTS 435.

YUGOSLAVIA 87

Extradition treaty.
Signed at Belgrade October 25, 1901; entered into force June 12, 1902.
32 Stat. 1890; TS 406; 12 Bevans 1238.

ZAMBIA 88

Extradition treaty. Signed at London December 22, 1931; entered into force June 24, 1935.
47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

EXTRADITION TREATY BETWEEN
THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF THE PHILIPPINES

The Government of the United States of America and the Government of the Republic of the Philippines;

Desiring to provide for more effective cooperation between the two States in the repression of crime; and

Desiring to conclude a Treaty for the reciprocal extradition of offenders,

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

(1) The Contracting Parties agree to extradite to each other, subject to the provisions described in this Treaty, persons against whom the competent authorities of the Requesting State have issued a warrant of arrest for, or who have been found guilty of, an extraditable offense committed within its territory.

(2) With respect to an offense committed outside the territory of the Requesting State, the Requested State shall grant extradition, subject to the provisions of this Treaty, if:

(a) its laws would provide for the punishment of such an offense in similar circumstances; or

(b) the person sought is a national of the Requesting State, and that State has jurisdiction to try that person.

ARTICLE 2

Extraditable Offenses

(1) Extraditable offenses under this Treaty are:

(a) offenses referred to or described in the Appendix to this Treaty and punishable under the laws of both Contracting Parties; or

(b) offenses, whether listed in the Appendix to this Treaty or not, provided the offense is punishable under the Federal laws of the United States and the laws of the Republic of the Philippines.

(2) For the purpose of this Article, it shall not matter:

(a) whether or not the laws of the Contracting Parties place the offense within the same category of offenses or denominate the offense by the same terminology; or

(b) whether or not the offense is one for which United States federal law requires proof of interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

(3) Extradition shall be granted in respect of an extraditable offense only if the possible penalty under the laws of both Contracting Parties is deprivation of liberty for a period exceeding one year or death. However, when the request for extradition relates to a person who has been convicted and sentenced, extradition shall be granted only if the duration of the penalty or aggregate of penalties still to be served amounts to at least six months or death.

(4) Subject to the conditions set out in paragraphs (1), (2) and (3), extradition shall also be granted for conspiring in, attempting, or participating in, the commission of an offense, or for being an accessory after the fact.

(5) When extradition has been granted with respect to an extraditable offense, it shall also be granted in respect to any other offense specified in the extradition request that meets all other requirements for extradition except for the periods of deprivation of liberty set forth in paragraph (3) of this Article.

ARTICLE 3

Political and Military Offenses

(1) Extradition shall not be granted if the offense for which it is requested is a political offense or is connected with a political offense. Nor shall extradition be granted if there are substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for such an offense. If any question arises as to the application of this

paragraph, it shall be the responsibility of the Executive Authority of the Requested State to decide.

(2) For the purpose of this Treaty, the following offenses shall not be deemed to be the offenses within the meaning of paragraph (1):

(a) the murder or other willful crime against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family;

(b) an offense with respect to which either Contracting Party has the obligation to prosecute or extradite by reason of a multilateral international agreement.

(3) Extradition also shall not be granted for military offenses which are not punishable under non-military penal legislation. It shall be the responsibility of the Executive Authorities of the Contracting Parties to decide any question arising under this paragraph.

ARTICLE 4

Prior Jeopardy for the Same Offense

(1) Extradition shall not be granted when the person sought has been tried and convicted or acquitted by the Requested State for the offense for which extradition is requested.

(2) Extradition shall not be precluded by the fact that the competent authorities of the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested or have decided to discontinue any criminal proceedings which have been initiated against the person sought.

ARTICLE 5

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the Requesting State, and the laws of the Requested State do not permit such punishment for that offense, extradition may be refused unless the Requesting State furnishes such assurances as the Requested State considers sufficient that if the death penalty is imposed, it will not be executed.

ARTICLE 6

Extraordinary or Ad Hoc Tribunals

(1) An extradited person shall not be tried by an extraordinary or ad hoc tribunal in the Requesting State.

(2) Extradition shall not be granted for the enforcement of a penalty imposed, or detention ordered, by an extraordinary or ad hoc tribunal.

(3) It shall be the responsibility of the Executive Authorities of the Contracting Parties to decide any question arising under this Article.

ARTICLE 7

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the Requesting State.

ARTICLE 8

Extradition of Nationals

(1) Neither of the Contracting Parties shall be bound to extradite its own nationals. The competent Executive Authority of the Requested State, however, shall have the power to grant the extradition of its own nationals if, in its discretion, this is deemed proper to do.

(2) The Requested State shall undertake all available legal measures to suspend naturalization proceedings in respect of the person sought until a decision on the request for his extradition and, if that request is granted, until his surrender.

(3) If the Requested State does not extradite its own national, it shall submit the case to its competent authorities in order that appropriate proceedings may be taken. If the Requested State requires additional documents or evidence, such documents or evidence shall be submitted without charge to that State. The Requesting State shall be informed of any action taken.

ARTICLE 9

Extradition Procedures and Required Documents

(1) The request for extradition shall be made through the diplomatic channel.

(2) The request for extradition shall be accompanied by:

(a) documents, statements, or other evidence which describe the identity and probable location of the person sought;

(b) a statement of the facts of the case, including, if possible, the time and location of the crime;

(c) the provisions of the law describing the essential elements and the designation of the offense for which extradition is requested;

(d) the provisions of the law describing the punishment for the offense; and

(e) the provisions of the law describing any time limit on the prosecution or the execution of punishment for the offense.

(3) In addition to the documents referred to in paragraph (2), a request for extradition relating to a person sought for prosecution shall be accompanied by a warrant of arrest issued by a judge or other judicial authority of the Requesting State and such evidence as, according to the law of the Requested State, would provide probable cause for his arrest and committal for trial if the offense had been committed there, including evidence providing probable cause to believe that the person requested is the person to whom the warrant of arrest refers.

(4) In addition to those items referred to in paragraph (3), a request for extradition relating to a convicted person shall be accompanied by:

(a) a copy of the judgment of conviction rendered by a court of the Requesting State; and

(b) evidence proving that the person sought is the person to whom the conviction refers.

If the person has been convicted but not sentenced, the request for extradition shall also be accompanied by evidence to that effect. If the convicted person has been sentenced, the request for extradition shall also be accompanied by a copy of the sentence imposed and a statement showing to what extent the sentence has not been carried out.

(5) Documents transmitted through the diplomatic channel shall be admissible in extradition proceedings in the Requested State without further certification, authentication or other legalization.

ARTICLE 10

Additional Evidence

If the Executive Authority of the Requested State considers that the evidence furnished in support of the request for the extradition is not sufficient to fulfill the requirements of this Treaty, that State shall request the submission of necessary additional evidence. The Requested State may set a time limit for the submission of such evidence, and, upon the Requesting State's application, for which reasons shall be given, may grant a reasonable extension of the time limit. If such evidence is not received within the period specified or the reasonable extension of the time limit granted by the Requested State, that person may be released from custody. However, such release shall not bar either the continued consideration of the request on the basis of the supplemented documents, or, if a final decision has already been taken, the submission of a new request for the same offense. In such a case, it shall be sufficient if reference is made in the new request to the supporting documents already submitted, provided these documents will be available at the extradition proceedings.

ARTICLE 11

Provisional Arrest

(1) In case of urgency, either Contracting Party may request the provisional arrest of any accused or convicted person. Application for provisional arrest shall be made through the diplomatic channel.

(2) The application shall contain: a description of the person sought; the location of that person, if known; a brief statement of the facts of the case including, if possible, the time and location of the offense; a statement of the existence of a warrant of arrest as mentioned in Article 9 or a judgment of conviction against that person; and a statement that a request for extradition of the person sought will follow.

(3) On receipt of such an application the Requested State shall take the appropriate steps to secure the arrest of the person sought. The Requesting State shall be promptly notified of the result of its application.

(4) Provisional arrest shall not be terminated unless, within a period of 60 days after the apprehension of the person sought, the Executive Authority of the Requested State has not received the formal request for extradition and the supporting documents required by Article 9.

(5) The termination of provisional arrest pursuant to paragraph (4) of this Article shall not prejudice the extradition of the person sought if the extradition request and the supporting documents mentioned in Article 9 are delivered at a later date.

ARTICLE 12

Decision and Surrender

(1) The Requested State shall promptly communicate through the diplomatic channel to the Requesting State its decision on the request for extradition.

(2) The Requested State shall provide reasons for any partial or complete rejection of the request for extradition.

(3) If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the law of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within the prescribed time, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offense.

ARTICLE 13

Delayed Decision and Temporary Surrender

If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the territory of the Requested State for a different offense, the Requested State may:

(a) Defer the surrender of the person sought until the conclusion of proceedings against that person, or the full execution of any punishment that may be or may have been imposed; or

(b) Temporarily surrender the person sought to the Requesting State for the purpose of prosecution. The person so surrendered shall be kept in custody while in the Requesting State and shall be returned to the Requested State after the conclusion of the proceedings against that person in accordance with conditions to be determined by mutual agreement of the Contracting Parties.

ARTICLE 14

Requests for Extradition Made by Third State

The Executive Authority of the Requested State, upon receiving requests from the other Contracting Party and from one or more third States for the extradition of the same person, either for the same offense or for different offenses, shall determine to which State it will extradite that person. In making its decision, it shall consider all relevant factors, including but not limited to:

(a) the State in which the offense was committed;

(b) in cases involving different offenses, the State seeking the individual for the offense which is punishable by the most severe penalty in accordance with the laws of the Requested State;

(c) in cases involving different offenses that the Requested State considers of equal gravity, the order in which requests were received from the Requesting States;

(d) the nationality of the offender.

ARTICLE 15

Rule of Speciality

(1) A person extradited under the Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State, unless:

(a) that person leaves the territory of the Requesting State after his extradition and voluntarily returns to it; or

(b) he does not leave the territory of the Requesting State within 30 days after being free to do so; or

(c) the Executive Authority of the Requested State consents to that person's detention, trial, or punishment for another offense, or to extradition to a third State. For purposes of this subparagraph, the Requested State may require the submission of the documents mentioned in Article 9 and/or the written views of the extradited person with respect to the offense concerned.

These conditions shall not apply to offenses committed after the extradition.

(2) If the offense for which the person was extradited is legally altered in the course of proceedings, that person may be prosecuted or sentenced provided:

(a) the offense under its new legal description is based on the same set of facts contained in the extradition request and its supporting documents; and

(b) any sentence imposed does not exceed that provided for the offense for which that person was extradited.

ARTICLE 16

Simplified Extradition

If the person sought irrevocably agrees in writing to extradition after personally being advised by a judge or competent magistrate of his right to formal extradition proceedings and the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings. Extradition pursuant to this Article shall be subject to Article 15.

ARTICLE 17

Surrender of Articles, Instruments, Objects and Documents

(1) To the extent permitted under the laws of the Requested State, all articles, instruments, objects of value, documents or other evidence relating to the offense shall be seized and surrendered upon the granting of the extradition. The property mentioned in this Article shall be handed over even when extradition cannot be effected due to the death, disappearance, or escape of the person sought. The rights of third parties in such property shall be duly respected.

(2) The Requested State may condition the surrender of the property upon satisfactory assurance from the Requesting State that the property will be returned to the Requested State as soon as practicable.

ARTICLE 18

Transit

(1) Either Contracting Party may authorize transit through its territory of a person surrendered to the other by a third State. The Contracting Party requesting transit shall provide the transit State, through diplomatic channels, with a request for transit which shall contain a description of the person being transited and a brief statement of the facts of the case. No such authorization is required where air transportation is used and no landing is scheduled on the territory of the other Contracting Party.

(2) If an unscheduled landing on the territory of the other Contracting Party occurs, transit shall be subject to the provisions of paragraph (1) of this Article. That Contracting Party may detain the person to be transitted for a period of 96 hours while awaiting the request for transit.

ARTICLE 19

Expenses and Representation

(1) Expenses related to the transportation of the person sought to the Requesting State shall be paid by the Requesting State. All other expenses related to the extradition request and proceedings shall be borne by the Requested State.

(2) The Requested State shall provide for representation of the Requesting State in any proceedings arising out of a request for extradition.

(3) No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the Requested State against the Requesting State.

ARTICLE 20

Language

All documents submitted by either Contracting Party shall be in the English language, or shall be translated into the English language, by the Requesting State.

ARTICLE 21

Scope of Application

This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force.

ARTICLE 22

Ratification and Entry into Force

(1) This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged at Manila as soon as possible.

(2) This Treaty shall enter into force 30 days after the exchange of the instruments of ratification.

ARTICLE 23

Denunciation

Either Contracting Party may terminate this Treaty at any time by giving written notice to the other Party, and the termination shall be effective one year after the date of receipt of such notice.

IN WITNESS WHEREOF, the undersigned duly authorized thereto, have signed this Treaty.

DONE in duplicate at Washington this 27th day of November, 1981.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

David M. McGovern

FOR THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES:

Eduardo Romualdez

APPENDIX

SCHEDULE OF OFFENSES

(1) Murder; assault with intent to commit murder.

(2) Manslaughter, homicide, parricide and infanticide.

(3) Malicious wounding; inflicting grievous bodily harm or physical injuries including mutilation.

(4) Rape; indecent assault.

(5) Unlawful sexual acts with or upon children under the age specified by the laws of the Contracting Parties.

(6) Procuration, white slavery including corruption of minors.

(7) Bigamy.

(8) Willful abandonment of a minor or other dependent person when that minor or other dependent person is or is likely to be injured or his life endangered.

(9) Kidnapping; abduction; false imprisonment; or any other illegal detention.

(10) Extortion, blackmail, threats, and coercion.

(11) Robbery; burglary; larceny or theft.

(12) Offenses relating to slavery or involuntary servitude.

(13) Fraud, which includes obtaining property, money or valuable securities by false pretenses or by defrauding the public or any person by deceit or falsehood or any fraudulent means, whether such deceit or falsehood or fraudulent means would or would not amount to a false pretense.

(14) Embezzlement or swindling; breach of trust; graft; malversation of public funds or property.

(15) Bribery, including soliciting, offering or accepting.

(16) Offenses against the laws relating to counterfeiting and forgery.

(17) Receiving or possessing any money, valuable securities or other property knowing the same to have been unlawfully obtained.

(18) Arson.

(19) Malicious injury to property.

(20) Offenses endangering public safety through explosion, flooding or other destructive means.

(21) Offenses against laws relating to piracy, as defined by statute or by the law of nations; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel.

(22) Unlawful seizure of an aircraft or vehicle.

(23) Malicious acts done with intent to endanger the safety of persons traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation.

(24) Offenses against the laws relating to firearms, ammunition, explosives, incendiary devices, nuclear materials or nuclear devices, and other prohibited weapons.

(25) Offenses against the laws relating to the traffic in, possession or production or manufacture of, narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other substances which produce physical or psychological dependence.

(26) Offenses against public health, such as the illicit manufacture of or traffic in chemical products or substances injurious to health.

(27) Offenses against the laws relating to importation, exportation or transit of goods, persons, articles, or merchandise, including violations of the customs laws.

(28) Offenses relating to willful evasion of taxes and duties.

(29) Offenses relating to false testimony, perjury, or subornation of perjury.

(30) Making a false statement to a government agency or official.

(31) Offenses against the laws relating to the administration or obstruction of justice.

(32) Offenses against the laws relating to regulation of public administration or abuse of public office.

(33) Offenses against the laws relating to the control of companies, corporations, or other juridical persons.

(34) Offenses against the laws relating to control of private monopoly or unfair competition.

(35) Offenses against the national economy, that is, offenses relating to basic commodities, or to securities and similar documents, including their issuance, registry, commercialization, trading or sale.

(36) Offenses against the laws relating to bankruptcy or fraudulent insolvency.

(37) Offenses against the laws relating to international trade and transfers of funds.

(38) Leading, directing or inciting a riot.

(39) Offenses relating to gambling.

(40) Assault or threat upon a public official relating to the execution of his duty.

(41) Escape and other offenses relating to evasion of sentence.

(42) Offenses with respect to which both Contracting Parties have the obligation to prosecute by reason of a multilateral international agreement.

March 18

Dave Beir -

I understand the Philippine connection has come up in the context of your extradition legislation. This is the State Dept's background information on that treaty.
We are withholding submitting it for ratification until the legislation issue is resolved, and then will probably seek to adjust it accordingly.

Would appreciate a call from you re: plans for the mark-up.

Thank you.

Tom Robinson
EA Bureau Cong. Liaison
632-1314
Dept. State

Have given same package to Debbie Owens.

Foreign Policy Aspects of U.S.-Philippine Extradition Treaty

The U.S.-Philippine extradition treaty was negotiated as part of the Department of Justice's efforts to deal with the rapidly increasing problem of transnational criminals -- criminals who, for reasons of improved international communications and transportation, are able to escape justice by committing a crime in one country and fleeing to another. In the last several years, the Department of Justice has been engaged in a very active program of negotiating extradition treaties, and modifying others on the books to meet modern law enforcement needs. The Philippine treaty is only one of a number of treaties recently negotiated or in the process of ratification. The United States has extradition relations with most countries.

The problem of transnational criminals has become a significant one in U.S.-Philippine relations, given the close historical relationship between our two countries. The number of persons of Filipino ancestry residing in the United States now totals about 800,000, and continues to grow rapidly. Several thousand American citizens live in the Philippines. Business and tourist traffic is also heavy. There are a number of cases where persons accused of common crimes such as fraud, drug-related offenses, and even murder have fled from one nation to the other. The Philippine-U.S. extradition treaty was negotiated to rectify this situation. Both countries have long appreciated the need for such a treaty as a crime reduction tool.

Negotiation of the extradition treaty was facilitated by the friendly relations between the U.S. and the Philippines. In addition, with the end of martial law, military tribunals in the Philippines were largely phased out. The Philippine government agreed in the treaty that extradited persons shall not be tried by extraordinary or ad hoc tribunals, and that extradition shall not be granted for the enforcement of a punishment imposed by such tribunals.

The treaty negotiated with the Philippines very closely resembles those negotiated in recent years with other countries, most notably the one with the Federal Republic of Germany. As is our standard practice, it applies retroactively as well as prospectively to extraditable offenses. Extradition is not automatic in any case. Each country, through its judicial and executive authorities, makes its own decision on whether to extradite based on satisfaction of the treaty terms and final Executive Branch discretion. The treaty contains provisions which make political and military offenses non-extraditable and provides for discretionary extradition of each country's nationals. The Philippine treaty contains other standard

safeguards concerning sufficiency of grounds for the provisional arrest and extradition of fugitives. The treaty would thus be implemented pursuant to the normal judicial and executive branch procedures applicable in other treaties, a requirement the Philippine government understands and accepts. Although the Philippine press and some U.S. media accounts have at times reflected misinterpretation of the treaty's provisions and intimated that the treaty could be used to extradite political opponents of the present government, the Philippine government explicitly agreed to and understands the treaty's provision excluding extradition for political offenses or politically motivated requests. The Foreign Minister of the Philippines has confirmed his government's view that the treaty is aimed at common crimes, not political offenses. We have no reason to believe the Philippine government would jeopardize the treaty by making improper extradition requests. In any event, the treaty clearly gives to each requested state the final authority to make its determination on whether extradition should be granted.

LAW ENFORCEMENT NEED FOR PHILIPPINE EXTRADITION TREATY

Since the Spanish-American war there has been a very close relationship between the Philippines and the United States. The United States has two major military bases in the Philippines, and a substantial number of other Americans live in, work in, or visit the Philippines. It is estimated that there are approximately 800,000 Filipinos, and American citizens of Philippine origin, living in the United States.

This close relationship is characterized among other things by a significant amount of criminal activity involving crimes committed by persons in one country who seek sanctuary in the other country. Without an extradition treaty, there is no effective way these persons can be sent back to the country in which they committed the crime for prosecution or service of sentence.

In July, 1980, the FBI listed thirteen persons, who it knew to be living in the Philippines, who had been charged with serious crimes in or against the United States. These persons include two charged with murder, four charged with bribery, and several others charged with substantial frauds or embezzlements. Since then we have been contacted by a number of federal and state law enforcement authorities desiring to obtain the extradition from the Philippines of persons who had committed serious crimes in the United States. We have been informed by Philippine law enforcement authorities that they are interested in the extradition from the United States of a significant number of Philippine nationals who embezzled large amounts of

money from Philippine banks and/or government agencies and then fled to the United States.

For the above reasons, we believe there is plainly a significant and growing law enforcement need for an extradition treaty between the United States and the Philippines.

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LEGAL ASPECTS OF THE U.S.-PHILIPPINES EXTRADITION TREATY

1. Q: Would the United States under this treaty automatically grant extradition requests made by the Philippines?

A: There would be nothing automatic about extradition under this treaty. As under all of our extradition treaties, each request would be carefully reviewed by the executive and judicial branches of this government to determine whether the requirements of the treaty have been satisfied.

2. Q: How does this treaty protect the rights of the person whose extradition is sought?

A: Some of the more important safeguards written into the treaty are:

--The offense for which extradition is requested must be punishable under the laws of both Parties. (Art. 2)

--Neither political nor military offenses are extraditable; nor will extradition be granted if there are substantial grounds for believing that the request is politically motivated. (Art. 3)

--The person sought must not have been either convicted or acquitted in the Requested State for the offense for which extradition is requested. (Art. 4)

--The Requested State has discretion to refuse extradition for an offense which is punishable in the Requesting, but not in the Requested, State by the death penalty, unless the Requesting State provides sufficient assurances that the death penalty, if imposed, will not be carried out. (Art. 5)

--An extradited person may not be tried by an extraordinary or ad hoc tribunal, nor shall extradition be granted for enforcement of a penalty imposed by such a tribunal. (Art. 6)

--Extradition shall not be granted for an offense when, under the laws of the Requesting State, the statute of limitations applicable to that offense has expired. (Art. 7)

--Neither Party is bound to extradite its own nationals. (Art. 8)

--A request for extradition must be supported by such evidence as would provide probable cause for the arrest and committal for trial of the person sought if the offense had been committed in the Requested State.

3. Q: Is a person charged with a political offense subject to extradition under this treaty?

A: No. Article 3, Paragraph (1), of the treaty expressly provides that extradition shall not be granted for a political offense or an offense connected with a political offense. It further provides that extradition shall not be granted if there are substantial grounds for believing that the request for extradition has, in fact, been made with a view of trying or punishing the person sought for a political offense.

4. Q: Who decides whether the offense for which extradition is sought is a political offense?

A: Article 3, Paragraph (1), provides that any question as to the application of the political offense exception shall be decided by the "Executive Authority of the Requested State," which, under our system, means the Secretary of State.

5. Q: Is the United States-Philippines Extradition Treaty unique insofar as it provides that any question involving application of the political offense provision is to be decided by the "Executive Authority" of the Requested State?

A: No, this provision is standard in our most recent extradition treaties, for example, our treaty with Mexico, which entered into force on January 25, 1980, and our recently ratified treaties with Colombia and the Netherlands. Moreover, the Departments of State and Justice support legislation -- S. 1940, the proposed Extradition Act of 1981 -- which would remove the political offense issue from the courts and place it within the sole discretion of the Secretary of State.

6. Q: Is this policy -- that the political offense issue should be within the exclusive jurisdiction of the Secretary of State -- an initiative of the Reagan administration?

A: No, the Mexican, Colombian and Dutch treaties were all negotiated and signed during the previous admini-

stration. Moreover, the forerunner of S. 1940, which contained identical provisions concerning the political offense issue, was introduced during, and was supported by, the previous administration.

7. Q: Are there qualifications to the political offense exception?

A: Yes, Article 3, Paragraph (2), states the standard qualifications. It provides that two sorts of offenses shall not be considered political offenses: (a) the murder or other willful crime against the life or physical integrity of a Head of State or a member of his family; and (b) an offense with respect to which either Contracting Party has the obligation to prosecute or extradite by reason of a multilateral international agreement. An example of the latter would be aircraft hijacking as defined by The Hague Convention of 1970.

8. Q: Why should a political offense claim be decided by the Secretary of State, rather than the courts?

A: As stated earlier, the previous administration was also of the view that the political offense should be within the exclusive province of the Secretary of State. A provision to this effect was included in an amendment proposed by Senators Kennedy, Hatch and Thurmond to S. 1722, the Criminal Code Reform Act. The reasons for the proposed change were well stated in a memorandum of law explaining the amendment, which was printed in the Congressional Record.

> "First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception. Moreover, under present case law the courts generally shun deciding whether the foreign government's extradition request is politically motivated, preferring to leave that decision to the executive branch. Thus, the approach adopted in the proposed subchapter is not a radical departure from present law. It should be noted that the political offense decisions are made exclusively by the executive branch of government in several foreign countries, including Canada and the Netherlands.
>
> "Second, the decision to shield a criminal from extradition on the ground that his offense was 'political' is not the kind of issue which lends

itself to resolution through the judicial process. There are few truly objective criteria by which a comprehensive definition of the term 'political offense' can be based,* and a public court proceeding is not an appropriate or desirable forum for careful analysis of a friendly foreign state's intentions or political system. Rather, a decision on the 'political offense' exception is (as the name suggests) inescapably political in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the executive branch to decide, much as the decision to offer political asylum is an executive decision.

"Third, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat internaticnal terrorism. The present law exacerbates this situation, because frequently the United States government, through the Departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against extradition on other grounds. By contrast, the approach taken by the proposed subchapter permits a more informed decision on extradition to be made in a manner less likely to be offensive to the friendly foreign government involved in the case."

9. Q: How under the treaty would a political offense claim be presented to the Secretary of State?

A: The procedure under this treaty would be the same as that called for by S. 1940 -- the Proposed Extradition Act of 1980. That bill, which places the political offense issue within the exclusive jurisdiction of the Secretary of State, provides that any evidence or argument the fugitive

*For instance, in In re McMullen, No. 3-78-1099MG (N.D. Cal. May 11, 1979), a federal magistrate in San Francisco barred the extradition to England of an admitted IRA bomber, holding that the fugitive's action (blowing up an army barracks in England) was an offense of a political character. This decision was a considerable setback for United States efforts to control international terrorism, and could make the United States a more attractive refuge for members of the IRA, the PLO, the Beider-Meinhoff gang, the Italian Red Brigade and other terrorists.

wishes to present to the Secretary shall be in writing. The memorandum of law submitted in support of S. 1722 explains that the Secretary would not be obliged to provide a formal hearing for a fugitive who claims the benefit of the political offense exception, but would instead utilize the resources of the State Department for gathering evidence and assessing the fugitive's claim. In the course of assessing the merits of such a claim, the Department would, of course, welcome the views of members of Congress, concerned citizens and other interested parties.

10. Q: Is the treaty intended to be used for extraditing Marcos opponents, such as Benigno Aquino?

A: Like other extradition treaties, this treaty is directed against common criminals. It is not directed against opponents of Marcos. As already pointed out, the treaty contains standard safeguards barring extradition for political offenses and politically motivated requests. The Department of State has made it clear it will enforce these safeguards. In any event, the Department of State does not believe that the Philippine Government will request the extradition of persons for political offenses or for political reasons.

11. Q: If a martial law regime, including a martial law court system, is reinstituted in the Philippines, how will that affect extradition requests from the Philippines?

A: Article 6 provides that an extradited person shall not be tried by an extraordinary or ad hoc tribunal in the Requesting State, nor shall extradition be granted for enforcement of a punishment imposed by such a tribunal. Hence, the Department of State will not extradite a person to be tried or punished by a martial law court.

12. Q: How will the treaty apply to U.S. servicemen at Clark and Subic Bases?

A: The treaty does not apply to active duty servicemen, members of the civilian component and dependents of both. They will continue to be covered by the criminal jurisdiction provisions of the Military Bases Agreement of 1947, as amended, which provides a basis for the return of covered personnel to the Philippines to stand trial for criminal offenses committed there.

13. Q: How will the treaty apply to former U.S. servicemen, former members of the civilian component, and dependents of both who were in the Philippines under the Military Bases Agreement?

A: These persons will be subject to the provisions of the extradition treaty, just as any other civilian American would be. Both countries have assumed that criminal jurisdiction matters relating to members of U.S. forces, of the civilian component and dependents are adequately covered by the Military Bases Agreement of 1947. Any request for extradition of such persons would therefore be subject to appropriate scrutiny by the United States Government.

14. Q: What proof is the Requesting State required to present to support its request?

A: Article 9 sets forth in detail the information and documents which must be submitted by the Requesting State to support its request for extradition. The evidence presented must be sufficient to establish the identity of the person sought, and include a factual description of the crime, the applicable law relating to the crimes, a judicially issued arrest warrant, and any other evidence which would provide probable cause for the person's arrest and committal for trial if the offense had occurred in the Requested State. It is significant to note these requirements meet the U.S. Constitutional standards for probable cause.

15. Q: Is the Philippine treaty unique insofar as it provides that it shall apply to offenses committed before as well as after it enters into force?

A: No. Virtually all of our extradition treaties have similar retroactivity provisions. Examples are the extradition treaties with the Federal Republic of Germany, Finland, Japan, Norway and Mexico.

16. Q: What happens under the treaty if someone is extradited to the Philippines on one charge, say tax-evasion, and the Philippine government later seeks to prosecute that person on another charge?

A: Article 15 of the treaty contains the Rule of Speciality, a long-standing restriction on such situations in extradition treaties. This rule prohibits, subject to certain exceptions, the Requesting State from detaining,

prosecuting or punishing the person extradited for an offense, committed prior to extradition, other than that for which extradition was granted. This prohibition may be waived, under certain conditions, one of which is if the Requested State consents to the person's detention, prosecution or punishment for the other offense. The Requested State retains the inherent authority to deny such consent for political offenses, politically motivated requests, or on any other grounds on which extradition could be denied or conditionally granted. Notably, when the Requested State's consent is required, Article 15 provides an opportunity for the extradited person to submit written views to the Requested State concerning the offense for which consent to prosecute or punish is being sought.

17. Q: What are the step-by-step procedures followed in handling a foreign extradition request?

A: The following procedures apply when the United States receives a request for extradition from any foreign government. The formal request for extradition and the supporting documents are first certified by the U.S. embassy in the requesting country, and then forwarded to the Department of State. If, after preliminary review, the State Department determines that the documents are in order, that the request comes within the scope of the treaty, and that there is no credible defense (for example, that the offense is a political offense or that the request is politically motivated), the request and documents are then forwarded to the Department of Justice for further review and appropriate action.

If the Justice Department determines that the documents are in order, it files them along with the request for extradition in the appropriate federal district court. The Justice Department then obtains from the court an arrest warrant and secures the arrest of the person sought, pending the extradition hearing. In rare instances, bail may be granted to the fugitive, when special circumstances are shown to exist. A hearing on the merits of the extradition request is then held before a United States Magistrate. The Department of Justice usually represents the interests of the requesting country in court. The fugitive is represented by his own or court-appointed counsel and, under current laws, may raise with the court any defense to extradition provided for in the treaty, including the

political offense exception. (Under the Philippine treaty, other recent U.S. treaties, and the Administration's bill (S. 1940), which is the Senate version of the proposed Extradition Act of 1981, the political offense issue would be decided by the Secretary of State only and not by the extradition hearing magistrate.)

If the Magistrate finds that probable cause exists to believe that the person committed the offense and that extradition is otherwise warranted, an order of extraditability is issued and the person is held in custody (again, eligible for bail only under special circumstances). The judicial record in the case is then certified to the Secretary of State for the exercise of his discretion as to whether extradition should be granted. Under existing law, the fugitive may seek judicial review of the Magistrate's finding by petitioning the District Court for a writ of habeas corpus, appealing denial of the writ of habeas corpus to the Court of Appeals, and ultimately petitioning the Supreme Court for a writ of certiorari. (Under proposed Senate and House legislation, the Magistrate's finding could be appealed directly to a higher federal court by either the fugitive or the government.)

The Secretary of State makes his determination taking into account the judicial record, the circumstances of the case and the written views of the fugitive. If the Secretary determines that extradition should be granted, he authorizes agents of the requesting country to take custody of the person and convey him to that country. The Secretary may condition the surrender of the fugitive on whatever grounds he deems reasonable or otherwise appropriate.

If the Secretary determines that extradition should be denied on, for example, political offense or other grounds, the requesting State is notified of this action and the person who was being sought is released. That person may not thereafter become subject to extradition for the offense in question pursuant to a request from that State.

18. Q: How would the United States deal with an extradition request from the Philippines based on fabricated charges against someone in the United States?

A: As in every other case, extradition requests from the Philippines would be subject to screening at a number of stages. The first opportunity to review a request to determine its bona fides is when the United States Embassy receives the documents and makes its certification as to their admissibility before the local courts. If the Embassy has reason to believe that the request or documents are ill-founded, whether for political or other reasons, the Embassy may return the documents or seek guidance from the Department. The next screening of the request occurs upon receipt of the documents at the Department of State, where, again, fabricated or ill-founded charges against someone would be caught, if missed during the first review. The Department of Justice must then determine whether the documents will stand up in court to careful judicial scrutiny. If the Justice Department determines this question in the affirmative, the United States Magistrate must determine at the extradition hearing whether the documents establish sufficient grounds to believe that extradition is warranted. Assuming the person is found extraditable, he may seek judicial review of the U.S. Magistrate's finding, thus providing further security against ill-founded charges. Finally, the Secretary of State again reviews the case in determining whether to sign the surrender warrant.

In light of the systematic review process that is followed for each request, it is highly unlikely that a request based on fabricated or dubious charges would result in extradition. Moreover, it is considered unlikely that the Philippine Government would seek to submit a request based on such charges.

19. Q: What is the history of negotiation of the U.S.-Philippine treaty?

A: Negotiations on this treaty opened in Manila between May 21-May 25, 1973. The talks were then suspended, pending further consideration, as noted in the official press release which stated, in relevant part, that:

> While a general understanding was reached on most matters pertaining to such a treaty, a number of important issues will require further consultation and discussion. The two governments agreed to study the questions still outstanding with a view toward concluding a satisfactory extradition treaty which will accommodate their mutual interests.

Important factors which influenced the U.S. decision to agree to resumption of the suspended negotiations in 1981 were the lifting of martial law in the Philippines earlier that year and the dismantling of military tribunals in that country. Negotiations resumed on September 17, 1981, the treaty was initialed on September 22, 1981 and the signing ceremony took place on November 27, 1981 in Washington, D.C.

Statements by Foreign Minister Romulo and Minister of State Tolentino on Extradition Treaty

1. SUMMARY: FOREIGN SECRETARY CARLOS P. ROMULO AND EX-SENATOR AND ASSEMBLYMAN ARTURO TOLENTINO EMPHASIZED PUBLICLY THAT POLITICAL OFFENSES NOT SUBJECT TO TREATY COVERAGE. TOLENTINO STATED ALSO THAT POLITICALLY MOTIVATED COMMON CRIMES WOULD NOT BE COVERED, AND THAT NONE OF "FILIPINO LEADERS IN U.S." CAN BE EXTRADITED. OPPOSITION LEADER NEWMAN CANOY HAS URGED U.S. SENATE TO REJECT TREATY. END SUMMARY

2. FOREIGN MINISTER ROMULO ISSUED A PRESS RELEASE ON FEBRUARY 5 (TEXT BEING TRANSMITTED SEPTEL) CRITICIZING "OPPOSITION ELEMENTS IN THE UNITED STATES WHO HAVE LAUNCHED A CAMPAIGN AGAINST THE U.S. SENATE'S RATIFICATION OF THE RP-US EXTRADITION TREATY." IN HIS RELEASE ROMULO STRESSED THAT POLITICAL OFFENSES ARE EXCLUDED FROM COVERAGE OF THE TREATY, AND THAT THE TREATY WILL NOT EXTEND EXTRADITION FOR CRIMES TRIED BEFORE MILITARY TRIBUNALS.

3. MINISTER OF STATE FOR FOREIGN AFFAIRS, EX-SENATOR AND RESPECTED GOVERNMENT PARTY FIGURE, ARTURO TOLENTINO, IN A SPEECH STATED THAT REJECTION OF THE TREATY "WOULD BE A GREAT DISSERVICE TO THE FILIPINO PEOPLE," ACCORDING TO FEBRUARY 7 "BULLETIN" ACCOUNT. TOLENTINO STATED THAT HE WAS SEEKING TO CORRECT IGNORANCE AND MISUNDERSTANDINGS OF THE TREATY, AND DISCUSSED HIGHLIGHTS OF THE TREATY. AFTER EXPLAINING THAT POLITICAL OFFENSES SUCH AS REBELLION, SUBVERSION, TREASON, AND SEDITION ARE EXCLUDED FROM THE TREATY, HE REPORTEDLY STATED THAT EVEN ORDINARY OFFENSES LIKE MURDER, ARSON, ILLEGAL POSSESSION OF FIREARMS WHICH WERE COMMITTED IN RELATION TO POLITICAL OFFENSES CANNOT BE EXTRADITED.

4. TOLENTINO POINTED OUT THAT EXTRADITION WOULD NOT BE PERMITTED FOR OFFENSES TRIED BEFORE A MILITARY TRIBUNAL, AND WILL NOT BE ALLOWED IF THE REQUESTED COUNTRY SUSPECTS ACCUSED IS BEING BROUGHT BACK TO BE TRIED FOR A POLITICAL OFFENSE, OR FOR AN OFFENSE NOT COVERED BY THE TREATY. HE DID OBSERVE THAT MURDER OF THE PRESIDENT WAS AN EXTRADITABLE OFFENSE.

5. ACCORDING TO "DAILY EXPRESS" ARTICLE SAME DAY HEADLINED "TOLENTINO ALLAYS FEARS ON TREATY," TOLENTINO ALSO STRESSED "THAT THE TREATY CONSTITUTES MANIFESTATION OF U.S. RECOGNITION THAT THE RULE OF LAW AND CONSTITUTIONAL DUE PROCESS EXIST IN THE PHILIPPINES." HE WAS QUOTED AS SAYING "I DON'T THINK OUR GOVERNMENT WOULD EVEN TRY TO CIRCUMVENT THE CLEAR TERMS OF THE TREATY, BECAUSE THE PRICE IS TOO HIGH, NAMELY THE LOSS OF CONFIDENCE AND TRUST OF THE UNITED STATES WHICH MAY THEN SUBSCRIBE THE TREATY." TOLENTINO, ACCORDING TO "EXPRESS," STATED ". . . THAT NONE OF THE FILIPINO LEADERS IN THE US-BASED OPPOSITION CAN BE EXTRADITED."

Minister of State Tolentino's February 4 Statement on Treaty

. . IN A RELATED DEVELOPMENT FORMER SENATOR AND HIGHLY RESPECTED ASSEMBLYMAN ARTURO TOLENTINO

STATED THAT THE CHARGES AGAINST MANGLAPUS, AQUINO AND SALONGA ARE SUBVERSION CASES, AND THEREFORE NOT EXTRADITABLE. IN FEBRUARY 5 "BULLETIN," TOLENTINO IS REPORTED TO HAVE STATED IN ADDITION THAT THE CHARGES ORIGINALLY WERE FILED BEFORE A MILITARY COURT BUT WERE TRANSFERRED TO CIVIL COURT ON ORDER OF "HIGHER AUTHORITIES." HE NOTED, HOWEVER, THAT ATTEMPTED ASSASSINATION OF THE PRESIDENT IS NOT CONSIDERED A POLITICAL OFFENSE AND IS EXTRADITABLE.

February 1, 1982 Philippine statement on extradition treaty

SUBJECT: EXTRADITION TREATY: SOLICITOR GENERAL CLARIFIES POLITICAL OFFENSES SECTION

1. (U) SUMMARY. SOLICITOR GENERAL MENDOZA HAS EXPLAINED TO THE PARLIAMENT IN WRITING THE MEANING OF THE POLITICAL OFFENSES SECTION OF THE EXTRADITION TREATY. MENDOZA'S LETTER HAS GENERATED PRESS COVERAGE FOCUSSING ON EXCLUSION OF POLITICAL OFFENSES. END SUMMARY.

2. (U) IN A FOLLOW UP TO HIS TESTIMONY TO PARLIAMENT ON JANUARY 25, (REFTEL A), SOLICITOR GENERAL ESTELITO MENDOZA HAS SENT 5 LETTERS TO THE PARLIAMENT COMMITTEE ON FOREIGN RELATIONS, CLARIFYING CERTAIN POINTS IN THE EXTRADITION TREATY, SPECIFICALLY, THE POLITICAL OFFENSES CLAUSE. JANUARY 30 "BULLETIN," REPORTING ON MENDOZA'S LETTER (EMBASSY MILE POUCH TEXT), HEADLINED "POLITICS NOT AIMED IN EXTRADITION PACT," "TIMES JOURNAL" OF THE SAME DAY HEADLINED "EXTRADITION PACT NOT AIMED AT EVERYONE," AND "DAILY EXPRESS" SAID "CRIMINALS NOT POLITICAL FOES, TARGET OF TREATY."

3. (U) MENDOZA WROTE THAT HE WISHED TO CLARIFY NATURE OF TREATY AND TO CORRECT "ERRONEOUS SPECULATIONS." HE SAID TREATY IS NOT MEANT TO "COVER ANY PARTICULAR INDIVIDUAL OR GROUP OF PERSONS AND, CERTAINLY, NOT POLITICAL 'REFUGEES' OR FUGITIVES FROM THE PHILIPPINES." ACCORDING TO PRESS ACCOUNTS LETTER STATED THAT "AS IS NOW UNIVERSAL PRACTICE, POLITICAL OFFENSES ARE EXPLICITLY EXCLUDED," AND THAT "TREATY IS NO MORE THAN A POSITIVE MANIFESTATION OF THE POLICY OF THE PHILIPPINES TO COOPERATE IN THE EFFORT OF THE INTERNATIONAL COMMUNITY TO REPRESS CRIME." MENDOZA ALSO MADE THE POINT THAT "PROVISIONS OF TREATY HAVE BEEN PATTERNED AFTER TREATIES WHICH U.S. HAS CONCLUDED WITH OTHER COUNTRIES."

4. (U) 5 FAIRLY LENGTHY ARTICLE IN "TIMES JOURNAL" DATED FEBRUARY 1 HEADLINED "LONGEST LIST OF OFFENSES," DETAILS SEVERAL STATEMENTS ATTRIBUTED TO MENDOZA CONCERNING THE TREATY. ARTICLE INDICATES THAT THE TREATY HAS THE MOST COMPREHENSIVE COVERAGE OF OFFENSES. AFTER A BRIEF DISCUSSION OF SOME OF THE COMMON CRIMINAL OFFENSES COVERED BY THE TREATY, THE ARTICLE QUOTES MENDOZA'S OBSERVATION THAT THE TREATY HAS 5 FEW BROAD CATEGORIES THAT WIDEN THE POTENTIAL COVERAGE OF THE TREATY, AS FOR EXAMPLE THE SECTION OF THE TREATY DEALING WITH FIREARMS, EXPLOSIVES, AMMUNITION, ETC., AND SECTION DEALING WITH NARCOTICS.

5. (U) IN DISCUSSION OF POLITICAL OFFENSES, MENDOZA STATES DETERMINATION OF WHETHER AN OFFENSE IS POLITICAL OR NOT IS LEFT UP TO THE EXECUTIVE BRANCH OF THE REQUESTED STATE. THIS IS SOMETHING NEW, HE NOTES, AND "IS INTENDED TO EXCLUDE POSSIBLE JUDICIAL INTERFERENCE IN THE MATTER." ARTICLE POINTS OUT THAT MURDER AND CRIMES "WILLFUL CRIMES AGAINST THE LIFE" OF THE HEAD OF STATE OR A MEMBER OF HIS FAMILY REMAIN EXTRADITABLE OFFENSES. HE POINTED OUT THIS IS A SECTION NOT ORIGINALLY INCLUDED IN THE U.S. DRAFT.

6. (U) ARTICLE INDICATED THAT "INFORMED SOURCES" HAD STATED THAT THE TREATY WAS "BOGGED DOWN" FOR SEVERAL YEARS BECAUSE OF THE PROVISION THAT AN EXTRADITED PERSON COULD NOT BE TRIED BY AN EXTRAORDINARY TRIBUNAL SUCH AS THE MILITARY COURTS ESTABLISHED DURING MARTIAL LAW. WITH THE DISMANTLING OF MARTIAL LAW, ARTICLE NOTES, WAS CLEAR FOR THE COMPLETION OF THE TREATY. ARTICLE CONCLUDES BY EMPHASIZING THE RETROACTIVE NATURE OF THE TREATY AND THAT A NUMBER OF GOVERNMENT OFFICIALS "WHO DEFRAUDED SOME STATE AGENCIES" AND ESCAPED TO THE STATES MAY NOW BE EXTRADITED AND PROSECUTED.

SUBJECT: TORIBIO ROMULO DENIES EXTRADITION TREATY AIMED
- AT OPPOSITION LEADERS

1. FOREIGN MINISTRY ISSUED FOLLOWING PRESS RELEASE FEBRUARY 5:

2. BEGIN QUOTE: EPB HITS OPPOSITION CAMPAIGN AGAINST U.S.
- - SENATE RATIFICATION OF EXTRADITION PACT.

FOREIGN MINISTER CARLOS P. ROMULO TODAY CRITICIZED OPPOSITION ELEMENTS IN THE UNITED STATES WHO HAVE LAUNCHED A CAMPAIGN AGAINST THE U.S. SENATE'S RATIFICATION OF THE RP-US EXTRADITION TREATY.

THE OPPOSITION IS MAKING IT APPEAR TO THE AMERICAN SENATORS THAT THE TREATY IS DIRECTED AGAINST OPPOSITION LEADERS IN THE U.S. WHO MAY HAVE BEEN INVOLVED IN THE COMMISSION OF POLITICAL OFFENSES, ROMULO SAID.

"EITHER THEY HAVE NOT READ ARTICLE3OF THE PACT WHICH EXCLUDES POLITICAL OFFENSES FROM THE LIST OF EXTRADITABLE CRIMES OR THEY CHOOSE TO IGNORE ARTICLE 6 WHICH STATES THAT EXTRADITION SHALL NOT BE GRANTED FOR THE ENFORCEMENT OF A PENALTY IMPOSED BY AN EXTRAORDINARY OR AD HOC TRIBUNAL," THE FOREIGN MINISTER POINTED OUT. AN EXAMPLE OF AN EXTRAORDINARY OR AD HOC TRIBUNAL IS A MILITARY COURT.

"THERE HAS BEEN AND THERE WILL BE NO INTENTION ON THE PART OF THE PHILIPPINE GOVERNMENT TO APPLY THE EXTRADITION TREATY TO POLITICAL OFFENSES," HE DECLARED.

THIS WAS SEMICONDED BY SOLICITOR GENERAL ESTELITO MENDOZA WHO NEGOTIATED THE TREATY IN HIS STATEMENT BEFORE THE BATASAN PAMBANSA FOREIGN RELATIONS COMMITTEE LAST WEDNESDAY, 3 FEBRUARY.

GENERAL ROMULO NOTED THAT THE PHILIPPINES INITIATED NEGOTIATIONS FOR THE PACT AS EARLY AS 1973, "LONG BEFORE ANY DECISIONS ON POLITICAL OR POLITICALLY-RELATED OFFENSES WERE HANDED DOWN BY PHILIPPINE MILITARY COURTS."

REBUTTING CHARGES THAT THERE HAS BEEN UNDUE HASTE AND LACK OF PUBLICITY IN OFFICIAL OF CIRCLES WITH RESPECT TO THE TREATY'S RATIFICATION, ROMULO EXPLAINED, AS CHAIRMAN OF THE COMMITTEE ON FOREIGN RELATIONS OF THE BATASAN, THAT THE COMMITTEE LAST WEDNESDAY (3 FEBRUARY) UNANIMOUSLY DECIDED TO CAUSE THE PUBLICATION OF THE FULL TEXT OF THE TREATY IN MAJOR METROPOLITAN DAILIES

AND TO INVITE INTERESTED PARTIES TO SUBMIT THEIR MEMORANDA TO THE COMMITTEE BY FEBRUARY 17, 1982.

UPON READING THE MEMORANDA, THE COMMITTEE, ACCORDING TO ROMULO, WILL ASK THE AUTHORS OF SUCH MEMORANDA TO VOICE ADDITIONAL INFORMATION WOULD BE NEEDED TO APPEAR BEFORE IT. END QUOTE ROSENTHAL

February 3, 1982 Interim National Assembly hearings on the US-Philippines extradition treaty

. AFTER THE HEARINGS, SOLICITOR GENERAL ESTELITO MENDOZA CORRECTED "CERTAIN MISCONCEPTIONS BEING CIRCULATED REGARDING THE TREATY." IN ANSWER TO A QUESTION OF OPPOSITION ASSEMBLYMAN FRANCISCO "KIT" TATAD, HE STRESSED THAT FORMER SENATORS HERMINO ROMMO AND RAUL MANGLAPUS ARE NOT EXTRADITABLE UNDER ITS PROVISIONS BECAUSE TREATY EXPRESSLY PROHIBITS ANY PERSON BEING EXTRADITED IF HE IS FACING CHARGES BEFORE AN "EXTRAORDINARY TRIBUNAL" SUCH AS A MILITARY COURT. MENDOZA EXPLAINED THAT WHEN THE TREATY WAS BEING NEGOTIATED, HE "HAD NO PERSON OR GROUP OF PERSONS IN MIND TO BE EXTRADITED." APPARENTLY STILL REFERRING TO ROMMO AND MANGLAPUS, MENDOZA SAID THAT IT IS "OUTRIGHTLY IMPOSSIBLE AND NOT AUTHORIZED UNDER THE TREATY" THAT THE GOVERNMENT WOULD FILE NEW CHARGES AGAINST OPPOSITIONISTS, OR THAT THEIR CASES WOULD BE TRANSFERRED FROM MILITARY TO CIVIL COURTS. HE NOTED THAT SUCH A MOVE MIGHT BE INTERPRETED BY THE REQUESTED COUNTRY AS AN ATTEMPTED CIRCUMVENTION OF THE TREATY, AND REITERATED THAT POLITICAL OFFENSES ARE NOT COVERED BY THE TREATY.

January 28 Interim National Assembly Hearings

SUBJECT: EXTRADITION TREATY

S. SUMMARY: BATASAN FOREIGN RELATIONS COMMITTEE, HEADED BY MINISTER ROMULO, HELD HEARINGS ON U.S./PHILIPPINES EXTRADITION TREATY JANUARY 28. SOLE WITNESS, SOLICITOR GENERAL ESTELITO MENDOZA, SAID: (A) TREATY IS RETROACTIVE; (B) POLITICAL AND SOME OTHER OFFENSES ARE NON-EXTRADITABLE, AND REQUESTED STATE WOULD DECIDE NATURE OF OFFENSE; (C) ACTS OF TERRORISM WOULD BE EXTRADITABLE, AND (D) EXTRADITION PROCESS IS NEVER SIMPLE. MENDOZA SCHEDULED TO CONTINUE TESTIMONY FEBRUARY 3. OPPOSITION "SHADOW CABINET" FOREIGN AFFAIRS SPOKESMAN, ASSEMBLYMAN FERNANDEZ, SAID TREATY COULD STIFLE DISSENT OF OPPOSITIONISTS LIVING IN U.S., AND EXPRESSED FEAR THAT GOP WOULD CIRCUMVENT POLITICAL OFFENSE EXCLUSION BY CHARGING POLITICAL OFFENDERS WITH COMMON CRIMES. MANILA PRESS REPORTED MENDOZA'S STATEMENTS EXTENSIVELY. END SUMMARY.

2. THE FOREIGN RELATIONS COMMITTEE OF THE BATASANG PAMBANSA HELD HEARINGS ON THE US/PHILIPPINES EXTRADITION TREATY JANUARY 28. PRESENT WERE FOREIGN MINISTER CARLOS P. ROMULO, ASSEMBLYMEN EMMANUEL PELAEZ--APPOINTED BY ROMULO TO CHAIR THE SESSION--AND ARTURO TOLENTINO, AND JUSTICE MINISTER RICARDO C. PUNO. ROMULO SAID THE PHILIPPINES HAD "WAITED FOR SEVEN YEARS TO HAVE THIS TREATY CONCLUDED." TOLENTINO SAID THAT WITH THE SIGNING OF THE TREATY, "THE U.S. GOVERNMENT RECOGNIZES THE PHILIPPINES' ADHERENCE TO THE RULE OF LAWS." PELAEZ SAID THE TREATY PROCESS WAS A "RECOGNITION OF THE POWER OF THE BATASAN TO RATIFY A TREATY."

3. SOLICITOR GENERAL ESTELITO MENDOZA, WHO WAS THE DAY'S SOLE WITNESS BEFORE THE COMMITTEE, CALLED THE TREATY "NOT ONLY DESIRABLE, BUT URGENTLY NECESSARY." HE EXPLAINED SEVERAL ASPECTS OF THE TREATY, E.G.:

(A) "THE DOCUMENT HAS RETROACTIVE APPLICATION."

(B) AMONG NON-EXTRADITABLE CRIMES ARE POLISICAL OFFENSES OR CRIMES CONNECTED TO POLITICAL OFFENSES, MILITARY OFFENSES NOT PUNISHABLE UNDER NON-MILITARY PENAL LEGISLATION, AND CASES WHERE DOUBLE JEOPARDY MIGHT ARISE. HE NOTED THAT WHEN A QUESTION ARISES AS TO NATURE OF AN OFFENSE, THE EXECUTIVE AUTHORITIES OF THE REQUESTED STATE WOULD DECIDE THE ISSUE.

(C) "ACTS OF TERRORISM ARE EXTRADITABLE," AND SUCH CRIMES WOULD INCLUDE THE 1958 ASTA BOMBING AND SIMILAR INCIDENTS, AS WELL AS MURDER AND CRIMES AGAINST THE LIFE OR PHYSICAL INTEGRITY OF A HEAD OF STATE OR MEMBERS OF HIS FAMILY.

(D) THE EXTRADITION PROCESS IS NOT A SIMPLE ONE, AND COULD BE "TEDIOUS AND SOMETIMES EXPENSIVE" FOR THE REQUESTING STATE.

4. ASSEMBLYMAN FILEMON FERNANDEZ, OVERSEER FOR FOREIGN AFFAIRS OF THE OPPOSITION'S SO-CALLED SHADOW CABINET, NOTED FEARS THAT THE TREATY "MIGHT BE USED TO STIFLE DISSENT BY FILIPINOS NOW LIVING IN THE U.S." WHILE NOTING THAT POLITICAL OFFENSES ARE NOT COVERED BY THE TREATY, HE EXPRESSED HIS APPREHENSION THAT THE GOVERNMENT COULD CIRCUMVENT THE POLITICAL OFFENSE EXCLUSION BY CHARGING OPPOSITIONISTS WITH SIMPLE CRIMES. HE SAID THE OPPOSITION MUST STUDY THE TREATY FURTHER BEFORE TAKING A STAND.

5. ALL MANILA PAPERS GAVE PROMINENT COVERAGE TO MENDOZA STATEMENT AND HEARINGS. ALL REPORTED CLEARLY THAT THE TREATY WOULD EXCLUDE POLITICAL OFFENSES, THOUGH MORE HEADLINED THIS POINT.
ROSENTHAL

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

N° 90

EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

CONVENTION EUROPÉENNE POUR LA RÉPRESSION DU TERRORISME

STRASBOURG, 27.I.1977

13-617 O—83——24

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members ;

Aware of the growing concern caused by the increase in acts of terrorism ;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment ;

Convinced that extradition is a particularly effective measure for achieving this result,

Have agreed as follows :

Article 1

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives :

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 ;

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 ;

c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents ;

d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention ;

e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons ;

f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2

1. For the purposes of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3

The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Les Etats membres du Conseil de l'Europe, signataires de la présente Convention,

Considérant que le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres ;

Conscients de l'inquiétude croissante causée par la multiplication des actes de terrorisme ;

Souhaitant que des mesures efficaces soient prises pour que les auteurs de tels actes n'échappent pas à la poursuite et au châtiment ;

Convaincus que l'extradition est un moyen particulièrement efficace de parvenir à ce résultat,

Sont convenus de ce qui suit :

Article 1

Pour les besoins de l'extradition entre Etats Contractants, aucune des infractions mentionnées ci-après ne sera considérée comme une infraction politique, comme une infraction connexe à une infraction politique ou comme une infraction inspirée par des mobiles politiques :

a. les infractions comprises dans le champ d'application de la Convention pour la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970 ;

b. les infractions comprises dans le champ d'application de la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signée à Montréal le 23 septembre 1971 ;

c. les infractions graves constituées par une attaque contre la vie, l'intégrité corporelle ou la liberté des personnes ayant droit à une protection internationale, y compris les agents diplomatiques ;

d. les infractions comportant l'enlèvement, la prise d'otage ou la séquestration arbitraire ;

e. les infractions comportant l'utilisation de bombes, grenades, fusées, armes à feu automatiques, ou de lettres ou colis piégés dans la mesure où cette utilisation présente un danger pour des personnes ;

f. la tentative de commettre une des infractions précitées ou la participation en tant que co-auteur ou complice d'une personne qui commet ou tente de commettre une telle infraction.

Article 2

1. Pour les besoins de l'extradition entre Etats Contractants, un Etat Contractant peut ne pas considérer comme infraction politique, comme infraction connexe à une telle infraction ou comme infraction inspirée par des mobiles politiques tout acte grave de violence qui n'est pas visé à l'article 1er et qui est dirigé contre la vie, l'intégrité corporelle ou la liberté des personnes.

2. Il en sera de même en ce qui concerne tout acte grave contre les biens, autre que ceux visés à l'article 1er, lorsqu'il a créé un danger collectif pour des personnes.

3. Il en sera de même en ce qui concerne la tentative de commettre une des infractions précitées ou la participation en tant que co-auteur ou complice d'une personne qui commet ou tente de commettre une telle infraction.

Article 3

Les dispositions de tous traités et accords d'extradition applicables entre les Etats Contractants, y compris la Convention européenne d'extradition, sont en ce qui concerne les relations entre Etats Contractants modifiées dans la mesure où elles sont incompatibles avec la présente Convention.

Article 4

For the purposes of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Contracting States, it shall be deemed to be included as such therein.

Article 5

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.

2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Article 8

1. Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.

3. The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 4

Pour les besoins de la présente Convention et pour autant qu'une des infractions visées aux articles 1er ou 2 ne figure pas sur la liste de cas d'extradition dans un traité ou une convention d'extradition en vigueur entre les Etats Contractants, elle est considérée comme y étant comprise.

Article 5

Aucune disposition de la présente Convention ne doit être interprétée comme impliquant une obligation d'extrader si l'Etat requis a des raisons sérieuses de croire que la demande d'extradition motivée par une infraction visée à l'article 1er ou 2 a été présentée aux fins de poursuivre ou de punir une personne pour des considérations de race, de religion, de nationalité ou d'opinions politiques ou que la situation de cette personne risque d'être aggravée pour l'une ou l'autre de ces raisons.

Article 6

1. Tout Etat Contractant prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'une infraction visée à l'article 1er dans le cas où l'auteur soupçonné de l'infraction se trouve sur son territoire et où l'Etat ne l'extrade pas aprés avoir reçu une demande d'extradition d'un Etat Contractant dont la compétence de poursuivre est fondée sur une régle de compétence existant également dans la législation de l'Etat requis.

2. La présente Convention n'exclut aucune compétence pénale exercée conformément aux lois nationales.

Article 7

Un Etat Contractant sur le territoire duquel l'auteur soupçonné d'une infraction visée à l'article 1er est découvert et qui a reçu une demande d'extradition dans les conditions mentionnées au paragraphe 1er de l'article 6, soumet, s'il n'extrade pas l'auteur soupçonné de l'infraction, l'affaire sans aucune exception et sans retard injustifié, à ses autorités compétentes pour l'exercice de l'action pénale. Ces autorités prennent leur décision dans les mémes conditions que pour toute infraction de caractère grave conformément aux lois de cet Etat.

Article 8

1. Les Etats Contractants s'accordent l'entraide judiciaire la plus large possible en matiére pénale dans toute procédure relative aux infractions visées à l'article 1er ou 2. Dans tous les cas, la loi applicable en ce qui concerne l'assistance mutuelle en matière pénale est celle de l'Etat requis. Toutefois, l'entraide judiciaire ne pourra pas être refusée pour le seul motif qu'elle concerne une infraction politique ou une infraction connexe à une telle infraction ou une infraction inspirée par des mobiles politiques.

2. Aucune disposition de la présente Convention ne doit être interprétée comme impliquant une obligation d'accorder l'entraide judiciaire si l'Etat requis a des raisons sérieuses de croire que la demande d'entraide motivée par une infraction visée à l'article 1er ou 2 a été présentée aux fins de poursuivre ou de punir une personne pour des considérations de race, de religion, de nationalité ou d'opinions politiques ou que la situation de cette personne risque d'être aggravée pour l'une ou l'autre de ces raisons.

3. Les dispositions de tous traités et accords d'entraide judiciaire en matière pénale applicables entre les Etats Contractants, y compris la Convention européenne d'entraide judiciaire en matière pénale, sont en ce qui concerne les relations entre Etats Contractants modifiées dans la mesure où elles sont incompatibles avec la présente Convention.

Article 9

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention.

2. It shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 10

1. Any dispute between Contracting States concerning the interpretation or application of this Convention, which has not been settled in the framework of Article 9, paragraph 2, shall, at the request of any Party to the dispute, be referred to arbitration. Each Party shall nominate an arbitrator and the two arbitrators shall nominate a referee. If any Party has not nominated its arbitrator within the three months following the request for arbitration, he shall be nominated at the request of the other Party by the President of the European Court of Human Rights. If the latter should be a national of one of the Parties to the dispute, this duty shall be carried out by the Vice-President of the Court or, if the Vice-President is a national of one of the Parties to the dispute, by the most senior judge of the Court not being a national of one of the Parties to the dispute. The same procedure shall be observed if the arbitrators cannot agree on the choice of referee.

2. The arbitration tribunal shall lay down its own procedure. Its decisions shall be taken by majority vote. Its award shall be final.

Article 11

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance or approval or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect immediately or at such later date as may be specified in the notification.

Article 9

1. Le Comité européen pour les problèmes criminels du Conseil de l'Europe suit l'exécution de la présente Convention.

2. Il facilite autant que de besoin le règlement amiable de toute difficulté à laquelle l'exécution de la Convention donnerait lieu.

Article 10

1. Tout différend entre Etats Contractants concernant l'interprétation ou l'application de la présente Convention qui n'a pas été réglé dans le cadre du paragraphe 2 de l'article 9, sera, à la requête de l'une des Parties au différend, soumis à l'arbitrage. Chacune des Parties désignera un arbitre et les deux arbitres désigneront un troisième arbitre. Si dans un délai de trois mois à compter de la requête d'arbitrage, l'une des Parties n'a pas procédé à la désignation d'un arbitre, l'arbitre sera désigné à la demande de l'autre Partie, par le Président de la Cour européenne des Droits de l'Homme. Si le Président de la Cour européenne des Droits de l'Homme est le ressortissant de l'une des Parties au différend, la désignation de l'arbitre incombera au Vice-Président de la Cour ou, si le Vice-Président est le ressortissant de l'une des Parties au différend, au membre le plus ancien de la Cour qui n'est pas le ressortissant de l'une des Parties au différend. La même procédure s'appliquera au cas où les deux arbitres ne pourraient pas se mettre d'accord sur le choix du troisième arbitre.

2. Le tribunal arbitral arrêtera sa procédure. Ses décisions seront prises à la majorité. Sa sentence sera définitive.

Article 11

1. La présente Convention est ouverte à la signature des Etats membres du Conseil de l'Europe. Elle sera ratifiée, acceptée ou approuvée. Les instruments de ratification, d'acceptation ou d'approbation seront déposés près le Secrétaire Général du Conseil de l'Europe.

2. La Convention entrera en vigueur trois mois après la date du dépôt du troisième instrument de ratification, d'acceptation ou d'approbation.

3. Elle entrera en vigueur à l'égard de tout Etat signataire qui la ratifiera, l'acceptera ou l'approuvera ultérieurement, trois mois après la date du dépôt de son instrument de ratification, d'acceptation ou d'approbation.

Article 12

1. Tout Etat peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation ou d'approbation, désigner le ou les territoires auxquels s'appliquera la présente Convention.

2. Tout Etat peut, au moment du dépôt de son instrument de ratification, d'acceptation ou d'approbation ou à tout autre moment par la suite, étendre l'application de la présente Convention, par déclaration adressée au Secrétaire Général du Conseil de l'Europe, à tout autre territoire désigné dans la déclaration et dont il assure les relations internationales ou pour lequel il est habilité à stipuler.

3. Toute déclaration faite en vertu du paragraphe précédent pourra être retirée, en ce qui concerne tout territoire désigné dans cette déclaration, par notification adressée au Secrétaire Général du Conseil de l'Europe. Le retrait prendra effet immédiatement ou à une date ultérieure précisée dans la notification.

Article 13

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including :

a. that it created a collective danger to the life, physical integrity or liberty of persons; or

b. that it affected persons foreign to the motives behind it ; or

c. that cruel or vicious means have been used in the commission of the offence.

2. Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

3. A State which has made a reservation in accordance with paragraph 1 of this article may not claim the application of Article 1 by any other State ; it may, however, if its reservation is partial or conditional, claim the application of that article in so far as it has itself accepted it.

Article 14

Any Contracting State may denounce this Convention by means of a written notification addressed to the Secretary General of the Council of Europe. Any such denunciation shall take effect immediately or at such later date as may be specified in the notification.

Article 15

This Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a Member of the Council of Europe.

Article 16

The Secretary General of the Council of Europe shall notify the member States of the Council of :

a. any signature ;

b. any deposit of an instrument of ratification, acceptance or approval ;

c. any date of entry into force of this Convention in accordance with Article 11 thereof ;

d. any declaration or notification received in pursuance of the provisions of Article 12 ;

e. any reservation made in pursuance of the provisions of Article 13, paragraph 1 ;

f. the withdrawal of any reservation effected in pursuance of the provisions of Article 13, paragraph 2 ;

g. any notification received in pursuance of Article 14 and the date on which denunciation takes effect ;

h. any cessation of the effects of the Convention pursuant to Article 15.

Article 13

1. Tout Etat peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation ou d'approbation, déclarer qu'il se réserve le droit de refuser l'extradition en ce qui concerne toute infraction énumérée dans l'article 1er qu'il considère comme une infraction politique, comme une infraction connexe à une infraction politique ou comme une infraction inspirée par des mobiles politiques, à condition qu'il s'engage à prendre dûment en considération, lors de l'évaluation du caractère de l'infraction, son caractère de particulière gravité, y compris :

a. qu'elle a créé un danger collectif pour la vie, l'intégrité corporelle ou la liberté des personnes ; ou bien

b. qu'elle a atteint des personnes étrangères aux mobiles qui l'ont inspirée ; ou bien

c. que des moyens cruels ou perfides ont été utilisés pour sa réalisation.

2. Tout Etat peut retirer en tout ou en partie une réserve formulée par lui en vertu du paragraphe précédent, au moyen d'une déclaration adressée au Secrétaire Général du Conseil de l'Europe et qui prendra effet à la date de sa réception.

3. Un Etat qui a formulé une réserve en vertu du paragraphe 1er de cet article ne peut prétendre à l'application de l'article 1er par un autre Etat ; toutefois, il peut, si la réserve est partielle ou conditionnelle, prétendre à l'application de cet article dans la mesure où il l'a lui-même accepté.

Article 14

Tout Etat Contractant pourra dénoncer la présente Convention en adressant une notification écrite au Secrétaire Général du Conseil de l'Europe. Une telle dénonciation prendra effet immédiatement ou à une date ultérieure précisée dans la notification.

Article 15

La Convention cesse de produire ses effets à l'égard de tout Etat Contractant qui se retire du Conseil de l'Europe ou qui cesse d'y appartenir.

Article 16

Le Secrétaire Général du Conseil de l'Europe notifiera aux Etats membres du Conseil :

a. toute signature ;

b. le dépôt de tout instrument de ratification, d'acceptation ou d'approbation ;

c. toute date d'entrée en vigueur de la présente Convention conformément à son article 11 ;

d. toute déclaration ou notification reçue en application des dispositions de l'article 12 ;

e. toute réserve formulée en application du paragraphe 1er de l'article 13 ;

f. le retrait de toute réserve effectué en application du paragraphe 2 de l'article 13 ;

g. toute notification reçue en application de l'article 14 et la date à laquelle la dénonciation prendra effet ;

h. toute cessation des effets de la Convention en application de l'article 15.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 27th day of January 1977, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory States.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente Convention.

Fait à Strasbourg, le 27 janvier 1977, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général du Conseil de l'Europe en communiquera copie certifiée conforme à chacun des Etats signataires.

For the Government
of the Republic of Austria :

Pour le Gouvernement
de la République d'Autriche :

Willibald PAHR

For the Government
of the Kingdom of Belgium :

Pour le Gouvernement
du Royaume de Belgique :

Renaat VAN ELSLANDE

For the Government
of the Republic of Cyprus :

Pour le Gouvernement
de la République de Chypre :

Ioannis CHRISTOPHIDES

For the Government
of the Kingdom of Denmark :

Pour le Gouvernement
du Royaume de Danemark :

K.B. ANDERSEN

For the Government
of the French Republic :

Pour le Gouvernement
de la République française :

P.C. TAITTINGER

For the Government
of the Federal Republic of Germany :

Pour le Gouvernement
de la République Fédérale d'Allemagne :

Hans-Dietrich GENSCHER

For the Government
of the Hellenic Republic :

Pour le Gouvernement
de la République hellénique :

Dimitri S. BITSIOS

For the Government
of the Icelandic Republic :

Pour le Gouvernement
de la République islandaise :

Einar AGUSTSSON

For the Government :
of Ireland :

Pour le Gouvernement
d'Irlande :

For the Government
of the Italian Republic :

Pour le Gouvernement
de la République italienne :

Gherardo CORNAGGIA MEDICI CASTIGLIONI

For the Government
of the Grand Duchy of Luxembourg :

Pour le Gouvernement
du Grand-Duché de Luxembourg :

Gaston THORN

For the Government
of Malta :

Pour le Gouvernement
de Malte :

For the Government
of the Kingdom of the Netherlands :

Pour le Gouvernement
du Royaume des Pays-Bas :

Max van der STOEL

For the Government
of the Kingdom of Norway :

Pour le Gouvernement
du Royaume de Norvège :

Knut FRYDENLUND

For the Government
of the Portuguese Republic :

Pour le Gouvernement
de la République portugaise :

José MEDEIROS FERREIRA

For the Government
of the Kingdom of Sweden :

Pour le Gouvernement
du Royaume de Suède :

Karin SÖDER

For the Government
of the Swiss Confederation :

Pour le Gouvernement
de la Confédération suisse :

Pierre GRABER

For the Government
of the Turkish Republic :

Pour le Gouvernement
de la République turque :

I.S. ÇAGLAYANGIL

For the Government
of the United Kingdom of Great Britain
and Northern Ireland :

Pour le Gouvernement
du Royaume-Uni de Grande-Bretagne
et d'Irlande du Nord :

Anthony CROSLAND

reports with recommendations to the house of delegates

AMERICAN BAR ASSOCIATION

1982 MIDYEAR MEETING • CHICAGO, ILLINOIS • JANUARY 25-26, 1982

NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.

REPORT WITH RECOMMENDATION

AMERICAN BAR ASSOCIATION
Report to the House of Delegates
of the Standing Committee on World Order Under Law and
the Section of International Law

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association approves in principle the concept of a convention which would address the problem of terrorist activities in the Americas in a comprehensive manner along the lines of the attached Model Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms.

REPORT

The United States has ratified several conventions designed to prevent and suppress specific terrorist activities, [1] and has signed another. [2] To date, however, it has not proved possible to draft a comprehensive convention against terrorism in the United Nations. The closest states have come to such a convention is the 1977 European Convention on the Suppression of Terrorism concluded by the Council of Europe.

A similar regional convention of comprehensive scope would be highly appropriate for the Americas. This approach would allow members of the Organization of American States to avoid, by merely listing offenses, the perhaps insurmountable problem of defining "terrorism". It would also focus attention on extradition as a primary method of ensuring that the perpetrators of acts of terrorism do not escape prosecution and punishment. To this end, this approach seeks to exclude covered crimes from the political offense exception to the extradition process.

The attached Model Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and

---

1. The Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971; the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, signed at Washington on February 2, 1971; the Convention on the Prevention and Punishment of Crimes Against the Internationally Protected Persons, Including Diplomatic Agents, signed at New York December 13, 1973.

2. The International Convention Against the Taking of Hostages, signed at New York on December 4, 1979.

Freedoms was drafted under the auspices of the Standing Committee on World Order Under Law in consultation with legal scholars. The Standing Committee, along with the Section of International Law, believes that the Model Convention would be suitable, with appropriate drafting changes reflecting further review in the negotiating process, for adoption as a regional convention for the Americas. Such initiatives as this were envisaged by the Report and Recommendation on international terrorism adopted by the Association in February 1981 and reaffirmed herein.

In Article 1, the Model Convention incorporates offenses already incorporated in other anti-terrorist conventions ratified by the United States. Similarly, many provisions in the Model Convention reflect common language appearing in the text of major international conventions. There are also several innovative provisions, including expansion of the substantive law of terrorism to crimes involving nuclear theft and nuclear sabotage (Art. 1(h), (1) and (2)); emphasis on extradition as the primary method to ensure prosecution of the accused (Art. 3); and increased protection for the rights of the accused, including an advisory role for the Inter-American Court of Human Rights (Arts. 7, 9, 10, 11).

There can be no doubt that U. S. ratification of a convention along the lines of the Model Convention would be constitutional. The constitutional authority would be the same as that for U. S. ratification of other anti-terrorist conventions. Ratification with the advice and consent of the Senate would be an exercise of the treaty power. However, the convention would be non-self-executing and would be dependent upon implementing legislation by Congress to become effective under U. S. law. Implementing legislation, in turn, would be based on the power to punish offenses against the law of nations, as well as on Congress' powers under the Commerce Clause and other provisions of the Constitution.

Respectfully submitted.

Charles N. Brower, Chairman,
Section of International Law.

Richard B. Lillich, Chairman,
Standing Committee on World Order Under Law.

January, 1982

ATTACHMENT

PREFACE

The *Model American Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms* was prepared for the ABA Standing Committee on World Order Under Law by Professor Bert B. Lockwood, Jr., Director of the Urban Morgan Institute of Human Rights, College of Law, University of Cincinnati, while acting as consultant to the Committee. A working group of the Committee, composed of Donald K. Duvall, Professor Richard B. Lillich and Harry A. Inman, Chairman, supervised the project which was financially supported by a grant from the U.S. Department of State.

The model Convention is premised upon the basic concept that each individual is entitled to the right to live without fear, *i.e.*, "The right to life, liberty and security of person." It incorporates terminology and offenses from other conventions approved by many countries, including the two major aircraft hijacking conventions, the two major diplomatic kidnapping conventions, the Postal Convention prohibition on mail bombs, the recent U.N. Hostage Convention, the Genocide Convention, the piracy provisions of the Geneva Conference on the High Seas and the 1975 United Nations General Assembly Declaration that lists prohibitions against torture. The modus operandi of the Convention relies upon extradition as an effective means for dealing with violent acts, while safeguarding the rights of the accused by creating a role for the newly established Inter-American Court of Human Rights.

It is the Committee's hope that this model Convention will be adopted by the countries of the Americas.

Sincerely,

Bruno V. Bitker
Chairman, ABA Standing Committee on
World Order Under Law

July 1, 1980

Model American Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms

Recognizing the universally accepted principle that every human being has the right to life, liberty, and the security of his person,

Aware that acts violating this principle continue to occur throughout the Western hemisphere,

Wishing to take effective measures to ensure that perpetrators of such acts do not escape prosecution and punishment,

Convinced that extradition is an effective measure for achieving this result,

THE MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES HAVE AGREED UPON THE FOLLOWING ARTICLES:

Article 1

The following offenses shall come within the scope of this Convention:

a. an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;

b. an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

c. an offense within the scope of the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International significance, signed at Washington on 2 February 1971;

d. an offense within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, signed at New York on 14 December 1973;

e. an offense within the scope of Article 11(e) of the Universal Postal Convention, signed at Tokyo on 14 November 1969;

f. an offense within the scope of the Genocide Convention adopted by the General Assembly of the United Nations on 9 December 1948;

g. an offense within the scope of Articles 13-16 of the Convention on the High Seas, signed at Geneva on 29 April 1958;

h. (1) the crime of "nuclear theft" which shall mean the theft of nuclear material capable of being used either as an explosive device or for radiological contaminants in its original form or in any derivation of that form. Any person or persons committing, participating in, directly inciting, encouraging or cooperating in the commission of the act of the theft of nuclear material shall be held accountable, irrespective of the motive involved;

(2) the crime of "nuclear sabotage" which shall mean a wilful act of violence against a nuclear facility in reckless disregard of the possible deleterious consequences or endangerment to the health of the neighboring communities. Any person or persons committing, participating in, directly inciting, encouraging or cooperating in the commission of the act of sabotage of a nuclear facility shall be held accountable, irrespective of the motive involved;

i. an offense within the scope of the United Nations General Assembly Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 9 December 1975 [Res. No. 3452 (XXX) I];

j. an offense within the scope of the International Convention against the Taking of Hostages, signed at New York on 4 December 1979.

Article 2

Each Contracting State shall incorporate the offenses included in Article 1 into its domestic law and make the offenses punishable by severe penalties.

Article 3

1. Each of the offenses included in Article 1 shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Furthermore, Contracting States undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between them.

2. If a Contracting State that makes extradition conditional upon the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it shall consider this Convention as the legal basis for extradition in respect of offenses included in Article 1. Extradition shall be subject to the procedural conditions provided for by the law of the requested State.

3. Contracting States that do not make extradition conditional upon the existence of a treaty shall recognize the offenses included in Article 1 as extraditable offenses between themselves subject to the procedural conditions provided for by the law of the requested State.

4. The offenses included in Article 1 shall be treated, for the purpose of extradition between Contracting States, as if they had been committed not only in the place in which they occurred but also in the territories of the Contracting States.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with domestic law.

Article 4

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought respecting offenses included in Article 1. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 5

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offense included in Article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offense included in Article 1 has been made for the purpose of obstructing or preventing the prosecution or punishment of a person alleged to have committed an offense included within Article 1.

Article 7

Any person, who is in the custody of a Contracting State and who is suspected of committing an offense included in Article 1, is entitled to all the legal guarantees set forth in the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights.

Article 8

A Contracting State in whose territory a person suspected to have committed an offens included in Article 1 is found and which has received a request for extradition from a Con tracting State shall, if it does not extradite that person, submit the case, without exceptio whatsoever and without undue delay, to its competent authorities for the purpose of prose cution. Those authorities shall make their decision in the same manner as in the case of an offense of a serious nature under the law of that State.

Article 9

Upon receipt of a request for extradition for an offense included in Article 1, a Contract ing State may refer the matter to the Inter-American Court of Human Rights pursuant to Article 64 of the American Convention on Human Rights for an advisory opinion as to whether granting the request for extradition would violate the provisions of this Conven tion. In like manner, a Contracting Party, which has made a request for extradition for an offense included in Article 1, may refer the matter to the Inter-American Court for an ad visory opinion.

Article 10

Extradition shall not be granted for an offense included in Article 1 while a request for an Advisory Opinion from the Inter-American Court of Human Rights pursuant to Article 9 of this Convention is pending.

Article 11

The Contracting States urge the Inter-American Court of Human Rights to adopt proce dures to ensure the expeditious handling of requests for advisory opinions pursuant to the provisions of this Convention.

Article 12

The provisions of all treaties and arrangements applicable between Contracting States are modified to the extent that they are incompatible with this Convention.

Article 13

This Convention shall remain open for signature by the Member States of the Organiza tion of American States.

Article 14

This Convention shall be ratified by the signatory States in accordance with their respec tive constitutional procedures.

Article 15

The original instrument of this Convention, the English, French, Portuguese, and Span ish texts of which are equally authentic, shall be deposited in the General Secretariat of the Organization of American States, which shall send certified copies to the signatory Govern ments for purposes of ratification. The instruments of ratification shall be deposited in the General Secretariat of the Organization of American States, which shall notify the signa tory Governments of such deposit.

Article 16

This Convention shall enter into force among the States that ratify it when they deposit their respective instruments of ratification.

Article 17

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed 23 May 1969.

Reservations may not be entered in conjunction with Articles 7, 9 and 10.

Article 18

This Convention shall remain in force indefinitely, but any of the Contracting States may denounce it. The denunciation shall be transmitted to the General Secretariat of the Organization of American States, which shall notify the other Contracting States thereof. One year following the denunciation, the Convention shall cease to be in force for the denouncing State, but shall continue to be in force for the other Contracting States.

Article 19

This Convention ceases to have effect in respect to any Contracting State which withdraws from or ceases to be a member of the Organization of American States

APPENDIX A

Convención Modelo Americana Sobre la Prevención y Sanción de Ciertas Formas Seria de Violencia que Exponen los Derechos y Libertades Fundamenta

Reconociendo el principio aceptado universalmente que cada ser humano tiene el recho a la vida, a la libertad, y a la seguridad de su persona,

Conscientes que actos que violan este principio continuan ocurriendo a través del hem ferio occidental,

Deseando tomar medidas efectivas para asegurar que los perpetradores de tales actos escapen prosecución y castigo,

Convencidos que la extradición es una medida efectiva para lograr este resultado,

LOS ESTADOS MIEMBROS DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS AQUÍ SUSCRITOS HAN CONVENIDO SOBI LO SIGUENTE:

Artículo I

Las siguientes ofensas entraran en el ámbito de esta Convención:

a. Una ofensa en el ámbito del Convenio para la Represión del Apoderamiento de Ae naves, firmado en La Haya el 16 de diciembre de 1970;

b. Una ofensa en el ámbito del Convenio Para la Represión de Actos Ilícitos Contr Seguridad de la Aviación Civil, firmado en Montreal el 23 de septiembre de 1971;

c. Una ofensa en el ámbito de la Convención Para Prevenir y Sancionar los Actos de T rorismo Configurados en Delitos Contra las Personas y la Extensión Conexa Cuar Estos Tengan Trascendencia Internacional, firmada en Wáshington el 2 de febrero 1971;

d. Una ofensa en el ámbito de la Convención Sobre la Prevención y el Castigo de los I litos Contra Personas Internacionalmente Protegidas, Inclusive los Agentes Diplor ticos, firmada en Nueva York el 14 de diciembre de 1973;

e. Una ofensa en el ámbito del Artículo 11(e) de la Convención Postal Universal, mada en Tokio el 14 de noviembre de 1969;

f. Una ofensa en el ámbito de la Convención Para la Prevención y la Sanción del Del de Genocidio adoptada por la Asamblea General de las Naciones Unidas el 9 de ciembre de 1948;

g. Una ofensa en el ámbito de los Artículos 13-16 de la Convención Sobre la Alta M firmada en Ginebra el 29 de abril de 1956;

h. (1) el crimen de "robo nuclear" que significará el robo de material nuclear capaz ser usado como dispositivos explosivos o como contaminantes radiológicos en forma original o en cualquier forma derivativa. Cualquier persona o personas q cometan, participen, instiguen directamente, fomenten o cooperen en la comisi del acto de robo de material nuclear será considerado responsable de tal acto, sin co sideración al motivo envuelto;

(2) el crimen de "sabotaje nuclear" que significará un acto voluntario de violen contra un establecimiento nuclear con un descuido imprudente de las posibles co secuencias nocivas o el peligro a la salud de las comunidades vecinas. Cualquier p sona o personas que cometan, participen, instiguen directamente, fomenten o coo eren en la comisión del acto de sabotaje de un establecimiento nuclear será consid ado responsable de tal acto, sin consideración al motivo envuelto;

i. Una ofensa en el ámbito de la Declaración de la Asamblea General de las Nacio Unidas Sobre la Protección de Todas las Personas Sujetas a la Tortura y Otro Trat

j. Una ofensa en el ámbito de la Convención Internacional Contra la Toma de Rehen firmada en Nueva York el 4 de diciembre de 1979.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

April 16, 1982

TO : House Committee on the Judiciary
Attention: David Beier

FROM : American Law Division

SUBJECT: Treaty Termination Or Suapension Undar International Law

In responae to your request, enclosed herewith is a raport that generally covers the international law rules and principles guiding a nation in its determination as to whather any given treaty might be considerad to be no longer in effect.

Since you have a apecial interest in extradition treaties, the only instances of poasible termination or auspension of an extradition treaty that was encountered during the limited research for the enclosed report was a notice of terminstion of the 1931 Extradition Treaty with Greace for a believed violation, and an unsuccesaful defense aasarted in an extradition case that the 1930 Extradition Treaty with Germany had been abrogated by the hostilitiea during World War 11.

1933—Roosevelt Notice of Termination of 1931 Extradition Treaty with Greece

Later in the same year, 1933, the Executive without consultation with Congress or the Senate, gave notice of intent to terminate the extradition treaty with Greece signed on May 6, 1931, which contained provision for termination on one year's notice after it had been in effect five years. 47 Stat. 2185. The notice was occasioned by a dispnte with Greece arising from the latter's refusal to surrender an individual accused of fraud. The United States believed that Greece was violating the treaty.

The notice was given on November 6, 1933, and the earliest possible termination date was November 1, 1937. The United States withdrew its notice of termination on September 29, 1937, after the United States and Greece signed a protocol of interpretation of the article of the treaty that had given rise to the dispute and the notice of termination.

It has been asserted that the notice was premised on the treaty already having been voided by Greece's violation. In fact the treaty was never voided, and remained in full force and effect between the parties throughout this period. The treaty remains in full force and effect to this day. 47 Stat. 2185; TS 855; 8 Bevans 853; 138 LNTS 293.

It is true that the U.S. notice of termination charges Greece with violating the 1931 treaty, and that the notice of termination was given for that reason. This case stands as the only instance of notice of termination given because of violation.

From a Dec. 1978 Memorandum from the Legal Advisor to the Secretary of State, and printed in Digest of U.S. Practice in International Law, 1978 (1980), at 735, 754

In *United States* v. *Deaton*, 448 F. Supp. 532 (1978), decided on March 13, 1978, the United States District Court for the Northern District of Ohio, Eastern Division, denied defendant's motion for discharge, predicated upon an argument that the 1930 Treaty on Extradition between the United States and Germany, under which he had been extradited from the Federal Republic of Germany, was invalid, and his extradition had been, therefore, improper. Deaton contended that the treaty, signed July 12, 1930 (TS 836; 47 Stat. 1862; 8 Bevans 214; entered into force April 26, 1931), had been abrogated by hostilities during World War II, that it had been made between the United States and a nation which no longer existed (the "Weimer Republic" of Germany), and that the treaty, although "noticed" in 1955 and 1956 by the United States and the Federal Republic of Germany (West Germany) had never received subsequent congressional ratification. Ruling against these contentions, District Judge Thomas D. Lambros said:

> The main question is whether the treaty has been abrogated by hostilities during World War II, or merely suspended during their duration. Both parties recognize that this is essentially a question of fact to be answered in accordance with the rule set out in *Argento* v. *Horn*, 241 F.2d 258 (6th Cir. 1957) (Stewart, J.). In *Argento*, then Circuit Judge Potter Stewart stated that the question
>
> "can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments."

Argento v. *Horn*, *supra* at 262. Mr. Justice Stewart concluded in that case that, among other factors,

> "the conduct of the political departments of the two nations . . ., evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities."

Id. In fact, the *Argento* test has already been applied to the instant treaty, and the treaty has been found, upon a certification by the Secretary of State, to be fully operative. *In re Ryan*, 360 F.Supp. 270, 272 n.4(2) (E.D.N.Y. 1973).

The Government has filed a similar certification in this case. In a statement dated June 9, 1977, Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, certifies as follows:

> "The Treaty on extradition between the United States and Germany, signed at Berlin, July 12, 1930 and proclaimed by the President April 22, 1931, remains in full force and effect between the United States and the Federal Republic of Germany (West Germany). The continuation in force of this treaty as between the United States and the Federal Republic was confirmed by an exchange of notes of January 10, 1955, April 13, 1956, and June 26, 1956, setting forth the understanding that the 1930 treaty would be applied and considered as fully operative. By these notes the treaty was made fully operative as of January 1, 1956, and it has remained in full force and effect since that date."

Government's Response to Defendant's Motion to Discharge Defendant (Exhibit A). Upon this certification and the authorities just discussed, the Court finds that the 1930 extradition treaty between West Germany and the United States is in full force and effect. The Court also finds, upon examining certified copies of certain diplomatic notes filed here June 29, 1977, concerning the extradition of Deaton, that his arrest and removal to the United States was conducted with the proper formalities pursuant to that treaty. *See, e. g.*, Note Verbale, Federal Republic of Germany Foreign Office (No. 511-531E-382/76) (Bonn, Dec. 7, 1976). This Court thus has jurisdiction over Deaton to try him on the indictment of May 28, 1976.

448 F. Supp. 582, 584.

Deaton had previously been tried under the same extradition on a 16-count indictment in the Northern District of Texas. He had been convicted on all 16 counts and sentenced, and the Court of Appeals for the Fifth Circuit had affirmed the conviction (*United States v. Deaton*, 568 F.2d 777 (Summary Calendar) (1977)).

On June 20, 1978, the United States and the Federal Republic of Germany signed a new treaty on extradition. Dept. of State *Press Release* No. 258, June 20, 1978.

Digest of U.S. Practice in International Law, 1978 (1980), at 765-766.

Daniel Hill Zafren
Specialist in American
Public Law

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

TREATY TERMINATION OR SUSPENSION UNDER INTERNATIONAL LAW

Daniel Hill Zafren
Specialist in American
Public Law
American Law Division
April 16, 1982

TREATY TERMINATION OR SUSPENSION UNDER INTERNATIONAL LAW

Basically, there are seven ways in which a treaty may effectively be terminated or suspended: (1) in accordance with the terms of the treaty itself; (2) by explicit or tacit agreement of the parties concerned; (3) through violation of the provisions of the agreement by one party, with one of the parties asserting that it considers the treaty abrogated or suspended by such violation; (4) by one party on the grounds that fundamental conditions on which the treaty rested had changed--the doctrine of rebus sic stantibus; (5) through emergence of a new peremptory norm of general international law conflicting with the treaty; (6) through the outbreak of hostilities between parties to the agreement; and (7) by impossibility of performance.[1/] Each of these forms of occurrences will be discussed in turn. Since this treatment of the subject will be general, it should be kept in mind that any given fact situation may present varying legal ramifications. For example, an event may automatically involve a treaty's termination, or it may present the offended or affected nation(s) with grounds for invoking the termination or suspension of the treaty, in whole or in part. Probably the major significance between a termination and a suspension is that in a suspension a new agreement is not necessary between the Parties after the suspension has ended.

Three documents will constitute the major source for this discussion. First, is the 1969 Vienna Convention on the Law of Treaties.[2/] [Vienna Convention]. This Treaty entered into force on January 27, 1980, and while only

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1/ See, for example, G. Von Glahn, Law Among Nations (3rd Ed. 1976), at 446-447.

2/ UN Doc. A/Conf. 39/27; 63 AM J. INT'L L. 875 (1969); 8 ILM 679.

applicable as such to treaties concluded between State Parties thereafter, it is primarily a restatement of the customary law on treaties and would be applicable thereby to ooo-Parties as well as to treaties concluded prior to its io force date.[3/] Second, the Restatement (Sacond) of the Foreign Relations Law of the United States (1965) [Restatement], prepared by the American Law Iostitute and which is a composite of the requirements of ioternational law and the norms of intarnational and United States practice. Third, Teotativa Draft No. 1 of the Restatement of the Foreign Relations Law of the United Statas (Revisad) (1980) [Tentative Draft], which is an attempted revision and expansion of the Second Restatement, with the intarnational agreemeot part largely following the Vienna Convention.

Tarms of the Traaty

Art. 54(2) of the Vienna Coovention provides that tha terminatioo of a traaty may taka place "in conformity with the provisions of the treaty." The Restatement §155 provides that an iotarnational agraameot may be suspanded or modified in accordance with proviaions included for that purpose. Provisions for suspenaion are oot common, and are more likely to appear io multilateral treaties. Tha following illustratioo is given in tha Commant to that Section:

> **Illustration:**
>
> 3. "The coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take affect only after having been duly published."

3/ The Unitad Statas is not a Party to the Vienna Convention, but auch is pending in tha Senate. Sea, Exec. L, 92d Cong., 1st Sess.

General and frequent practice finds a termination provision or a provision for unlimited termination. The following illustrations are offered in the Comment:

Illustrations:

4. "This agreement shall continue in force for a period of five years and remain in force thereafter for a further period of five years unless notice is given by one of the parties to the other of its intention to withdraw from the agreement, in which case the agreement shall lapse at the expiration of a period of one year from the day of receipt of such notice."

5. "Any party to this agreement may give notice of withdrawal at any time after the expiration of three years from its coming into effect by notification to the government of state A. The withdrawal shall have effect from the date of the receipt of the notification and shall operate only as regards the party making the withdrawal."

The Tentative Draft follows the Vienna Convention closely.

There can be an implied right to terminate even if there is no specific provision. Art. 56 of the Vienna Convention reads:

ARTICLE 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

The Tentative Draft provides:

> **§ 340. Termination or Denunciation of or Withdrawal from an International Agreement**
>
> **(1) The termination of an international agreement or the withdrawal of a party may take place:**
>
> **(a) in conformity with the provisions of the agreement; or**
>
> **(b) at any time by consent of all the parties after consultation with the other contracting states.**
>
> **(2) An agreement which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:**
>
> **(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or**
>
> **(b) a right of denunciation or withdrawal may be implied by the nature of the agreement.**
>
> **(3) A party shall give not less than twelve months' notice of its intention to denounce or withdraw from an agreement under subsection (2).**

Thus, a treaty can come to an end when the acts called for by its terms have been performed, when its specified expiration date has been reached, or when it has been denounced or renunciated as expressly or impliedly provided for therein.

In connection with debate on the Panama Canal Treaties, the Legal Adviser, Department of State, wrote on March 1, 1978, concerning the legal effect of a unilateral attempt by Panama to abrogate the Treaty prior to its termination date as follows:

> The termination of a treaty, or the suspension of its operation, may take place only in conformity with generally accepted rules and practices of international law. In the case of the Panama Canal Treaty, the governing rule is set forth in article II(2) of the Treaty itself. That article stipulates that the Treaty will terminate at noon, Panama time, December 31, 1999. Absent mutual consent to an earlier termination, or a termination with another appropriate basis in international law, such as material breach by the United States or impossibility of performance, the Panama Canal Treaty will remain in force until the specified time. A unilateral declaration of abrogation or suspension by Panama, prior to the specified date, will not be effective.
>
> Therefore, until the Panama Canal Treaty is terminated on December 31, 1999, the United States will have the legal right to assert and enforce all U.S. rights under the Treaty.
>
> 4/

Explicit or Tacit Agreement

Art. 54(b) of the Vienna Convention provides that a treaty can be terminated "at any time by consent of all the parties after consultation with the other contracting States." Art. 57(b) provides for suspension of the operation of a treaty under the same condition. Further, Arts 58 and 59 read:

4/ Department of State, Digest of U.S. Practice in International Law, 1978 (1980), at 767.

ARTICLE 58

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

ARTICLE 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

There is no corresponding provision in the Restatement, but the Tentative Draft provides:

§ 341. Suspension of the Operation of Agreements.

(1) The operation of an international agreement in regard to all parties or to a particular party may be suspended:

(a) in conformity with the provisions of the agreement; or

(b) at any time by consent of all the parties after consultation with the other contracting states.

(2) Two or more parties to a multilateral international agreement may conclude an agreement to suspend the operation of provisions of the international agreement, temporarily, and as between themselves alone, if:

(a) the possibility of such suspension is provided for by the international agreement, or

(b) the suspension in question is not prohibited by the international agreement and:

(i) does not affect the enjoyment by the other parties of their rights under the agreement or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the agreement.

§ 344. Conclusion of Later Agreement.

(1) An international agreement shall be considered as terminated if all the parties to it conclude a later agreement relating to the same subject-matter and:

(a) it appears from the later agreement or is otherwise established that the parties intended that the matter should be governed by that agreement, or

(b) the provisions of the later agreement are so far incompatible with those of the earlier one that the two agreements are not capable of being applied at the same time.

(2) The earlier agreement shall be considered as only suspended in operation if it appears from the later agreement or is otherwise established that such was the intention of the parties.

Therefore, an agreement can end if there is written agreement to that effect, usually found in a new treaty between the parties containing a provision terminating prior treaties between them with specific referral to such earlier instruments.

Treaty termination by implication can occur in a number of ways. For example, through inconsistency, similar to United States statutory construction rules. Where there is an unreconcilable inconsistency between an earlier and later agreement relating to the same subject matter, the later agreement will

prevail.[5] There is even authority to the effect that there can be an implied agreement to terminate a prior existing general bilateral treaty, in whole or in part, by a later and more specific multilateral agreement even if that later agreement contains a savings clause preserving the validity of bilateral agreements between the parties. Thus, the United States Court of Appeals for the Second Circuit in discussing the legal relationship between the 1953 bilateral Friendship, Commerce and Navigation Treaty Between the United States and Japan and the multilateral 1970 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, stated in a footnote as follows:

> 4. The Japanese Treaty, a general treaty, is not quite as specific in its arbitration clause as the Convention. Article IV, ¶ 2 provides:
>
> "Awards duly rendered pursuant to any . . . contracts [providing for arbitration of disputes], which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." 4 U.S.T. 2063 at 2068, T.I.A.S. 2863 at 7.
>
> To the extent that there may be a conflict between the Treaty and the Convention, we think that where both parties to a bilateral treaty, Japan and the United States, later become signatories to a multinational convention covering the same subject matter, the Convention is intended to control. We reach this conclusion despite the saving clause preserving the validity of bilateral agreements between the contracting states. Convention, Article VII. The adhesion of additional signatories does not affect the circumstance that each signatory, bound by bilateral agreement, is modifying its earlier engagement vis-a-vis the other, but only to the extent necessary. Furthermore, inasmuch as both agreements further the same purpose, the one tending to further that purpose most forcefully, the Convention, should be given effect.

[6]

Another example of a tacit agreement might be where the Parties let a treaty lapse through nonobservance, i.e., each in turn fails to comply with its terms and no one protests such nonobservance because all are in tacit agreement that they no longer wish to be bound by it.[7]

5/ Tentative Draft, Comment to §344.

6/ Fotochrome, Inc. v. Copal Company, Limited, 517 F. 2d 512, 518 (2d Cir. 1975).

7/ Von Glahn, supra note 1, at 448.

Violation of Provisions

The Vienna Convention states in Arts. 60 and 45:

ARTICLE 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

ARTICLE 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

The Restatement provision, §158 reads:

§ 158. Violation of Agreement

(1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement

(a) suspend performance of its obligations towards the violating party so long as the latter is in violation, if the violation and suspension involve corresponding provisions or the suspension is otherwise reasonably related to the violation,

(b) terminate as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart, or

(c) terminato the entire agreement as between itself and the violating party if the violation, considered in relation to all the terms of the agreement and the extent to which they have been performed, has the effect of depriving the aggrieved party of an essential benefit of the agreement.

(2) The exercise of the rights stated in Subsection (1) does not deprive the aggrieved party of the claim for violation of international law that accrues to it as a result of the violation of the agreement and that may be adjudicated in an appropriate forum as indicated in § 3 (1) (a).

The Tentative Draft §345 states:

§ 345. Material Breach of an Agreement.

(1) A material hreach of a bilateral international agreement by one of ihe parties entiiles ihe other to invoke the hreach as a ground for terminating the agreement or suspending its operation in whole or in part.

(2) A material hreach of a multilateral agreemeni by one of the parties eniitles:

(a) ihe other parties by unanimous agreement to suspend the operation of ihe agreement in whole or in part or to ierminate ii either:

(i) in the relations between themselves and the defaulting state, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the agreement in whole or in part in the relations between itself and the defaulting state;

(c) any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the agreement in whole or in part with respect to itself if the agreement is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the agreement.

The main thrust of this operative form is that the breach must be material; materiality is to be determined by the offended Party; and it does not ipso facto terminate or suspend the agreement but it is in the discretion of the offeoded party to treat it as such. "Wheo a material breach occurs between the parties to an ioternational agreement, the process of performance begins to merge with that of termination. A most difficult question is that of when a breach departs so substaotially from the original expectations of the parties as to justify the invocation of sanctioning procedures."[8/] A material breach would be a violation of a provision essential to the accompliahment of soy object or purpose of the tresty.[9/]

8/ M.S. McDougal and W.M. Reisman, International Law in Contemporary Perspective (1981), at 1232.

9/ International Law Commissaion Report, U.N. Doc. A/6309/Rev. 1 (1966).

Again, in connection with the Panama Canal Treaties debates, on March 1, 1978, the Legal Adviser, Department of State, wrote in regard to the legal effect of a material breach by Panama:

> Moreover, a material breach of the Panama Canal Treaty by Panama would entitle the United States to suspend performance of its obligations in whole or in part. Article 60(1) of the Vienna Convention on the Law of Treaties provides that:
>
> "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."
>
> In the Panama Canal Treaty, the United States has agreed, *inter alia*, (a) that Panama will receive certain payments each year during the life of the Treaty, (b) that Panamanian nationals will increasingly participate in the operation and maintenance of the Canal and that Panama's forces will participate in the defense of the Canal, (c) to transfer to Panama certain property at the entry into force of the Treaty and during its lifetime, and (d) to transfer the Canal and related property to Panama on December 31, 1999.
>
> In the event of a material breach by Panama of its obligations, it would be perfectly appropriate for the U.S. to withhold performance of these and other U.S. obligations under the Treaty until Panama complied once again with its obligations.

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Changed Circumstances (Rebus Sic Stantibus)

Art. 62 of the Vienna Convention reads:

> ARTICLE 62
>
> *Fundamental change of circumstances*
>
> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (*a*) if the treaty establishes a boundary; or
>
> (*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

10/ Department of State, Digest of U.S. Practice in International Law, 1978, at 767.

The Restatement provision, §153 states:

§ 153. Rule of Rebus Sic Stantibus: Substantial Change of Circumstances

(1) An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.

(2) A party may rely on an interpretation of the agreement as indicated in Subsection (1) as a basis for suspending or terminating performance of the obligations in question only if it did not cause the change in the state of facts by action inconsistent with the purpose of the agreement and has otherwise acted in good faith.

(3) When the conditions specified in Subsection (1) apply only to a separable portion of the agreement, suspension or termination applies only to that portion.

The corresponding section, §346, of the Tentative Draft provides:

§ 346. Fundamental Change of Circumstances.

(1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of an international agreement, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the agreement unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the agreement; and

(b) the effect of the change is radically to transform the extent of obligations still be to performed under the agreement.

> (2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from an agreement:
>
> (a) if the agreement establishes a boundary; or
>
> (b) if the fundamental change is a result of a breach by the party invoking it either of an obligation under the agreement or of any other international obligation owed to any other party to the agreement.

The doctrine of rebus sic stantibus has been the most widely written about in the arena of treaty termination, and is probably the most controversial and irritating problem concerning treaties.[11/] The doctrine and particularly Art. 62 of the Vienna Convention has been the subject of harsh criticism.[12/] There is great uncertainty as to its actual application. "The real problem involved in the doctrine of rebus sic stantibus arises when such invocation is sought in actual practice. Few writers and fewer statesmen appear to be able to agree on when, the doctrine could be justifiably invoked."[13/] (Emphasis in the original).

In the Fisheries Jurisdiction Case,[14/] the International Court of Justice indicated that in order for a change of circumstances to give rise to a ground for invoking the termination of a treaty it is necessary that "it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to

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11/ Von Glahn, supra note 1, at 448-449.

12/ See, for example, A.E. David, The Strategy of Treaty Termination (1975), at 44-45. "Never in its long history has the principle of rebus sic stantibus been so restricted and watered down as in our time." (at 54).

13/ Von Glahn, supra note 1, at 449.

14/ Federal Republic of Germany v. Ireland, 1973 ICJ Rep. 3, 12 ILM 300.

to be executed to the extent of rendering the performance something essentially different from that originally undertaken."

New Peremptory Norm (Jus Cogens)

Art. 64 of the Vienna Convention states

ARTICLE 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Art. 66 provides for referral to the International Court of Justice by a party if there is a dispute as to the emergence of a new peremptory norm, unless arbitration is agreed on.

The Restatement does not have a provision contemplating the development of new peremptory norms, (although §116 recognizes existing "rules of international law incorporating basic standards of international conduct" which would make any entered into treaty in violation thereof invalid), and there is divided legal opinion on whether jus cogens actually exists, and even if it does what are and are not such rules from which law does not permit any derogation.[15/]

However, the Tentative Draft does follow the Vienna Convention in §347:

§ 347. Emergence of a New Peremptory Norm

If a new peremptory norm of general international law emerges, any existing agreement which is in conflict with that norm becomes void and terminates.

It might also be pointed out that in effect, at least, the concept is recognized in Art. 103 of the United Nations Charter which provides that if there is a conflict between the obligations of its Member under the Charter and their

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15/ Von Glahn, supra note 1, at 444-445. If there is such a rule, it could be modified by a subsequent norm of general international law having the same character.

obligations under any other international agreement, those under the charter shall prevail.[16/]

Outbreak of Hostilities

Legal opinion differs widely on the effect of hostilities between parties to a treaty, although generally treaties not incompatible with a state of war are not suspended or terminated by the outbreak of hostilities.[17/] The Vienna Convention does not take a stance on the issue (Art. 73).[18/] The Restatement §157 and part of its Comment provides:

> **§ 157. Hostilities between Parties to International Agreement**
>
> **An international agreement that, either by express provision or by reason of its nature, is intended to be operative during hostilities is not affected by hostilities involving one or more parties to the agreement.**
>
> **Comment:**
>
> *a. Agreement designed to be operative during hostilities.* A bilateral agreement may provide for the safe departure within a specified period of time of the nationals of one party in the territory of the other if hostilities break out between them. An agreement of this type may also provide that the property of such nationals will not be confiscated, sequestrated, seized, or embargoed in the event of hostilities. Multilateral agreements having a legislative character and dealing with rules to be followed by states in the conduct of hostilities constitute, however, the most significant group of agreements that are operative during hostilities.

16/ See, Restatement, Comment to §116.

17/ Von Glahn, supra note 1, at 563-564. See, also Clark v. Allen, 331 U.S. 503 (1947), and the Comments to §346 of the Tentative Draft.

18/ Art. 74 does cover instances where there is a break in diplomatic relations:

> ARTICLE 74
>
> *Diplomatic and consular relations and the conclusion of treaties*
>
> The severance or absence of diplomatic or consular relations between two or more states does not prevent the conclusion of treaties between those states. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

The Tentative Drsft does not give specisl trestment to this form of tresty terminstion or suspension, but includes it ss a commentary specisl applicstion of the doctrine of rebus sic stsntibus (§346), ststing thst it is srguable that major hostilities sre "chsnged circumstances" providing s basis for suspending or terminsting the tresty, regardless of whether there is s lawful state of war.

Impossiblity of Performance

Art. 61 of the Vienna Convention resds:

ARTICLE 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

The Restatement covers disappearance of a State, transfer of territory, and a change in government in separate provisions.

§ 159. **Disappearance of State**

If a state that is a party to an international agreement ceases to exist as a state, the agreement is terminated as to it, but the state into which it is incorporated or the states into which it is divided succeed to its rights and obligations under the agreement to the extent that

(a) the agreement defines the boundaries of the territory of the former state, or

(b) the agreement relates to the use of the territory or its natural resources.

§ 160. Transfer of Territory

(1) If a state that is a party to an international agreement transfers part of its territory to a state that is not a party, the agreement ceases to apply with respect to the first state to the extent that it relates to such territory. The other state succeeds to the rights and obligations of the first state under the agreement with respect to any other party to the agreement to the exent that

(a) the agreement defines the boundaries of the transferred territory, or

(b) the agreement relates to the use of the territory or its natural resources.

(2) If a state that is a party to an international agreement acquires additional territory, the applicability of the agreement with respect to the territory is determined by interpretation of the agreement. Normally, the agreement will be interpreted as applying to the additional territory unless it manifests an intent that it is to apply only to the territory belonging to the state at the time when the agreement is made.

§ 161. Change in Government

A change in the type or nature of the government of a state does not alter the binding effect of international agreements to which the state is a party.

The Tentative Draft, in a commentary explanation to §346, regards impossibility as a particular application of rebus sic stantibus, reasoning that the disappearance of an indispensable object would ordinarily constitute a "fundamental change of circumstances."

Citing §159 of the Restatement, it has been held that the 1961 Treaty with the Republic of Vietnam containing assurances that neither Party shall take property of the other without just compensation has terminated since one of the contracting parties no longer exists.[19/] Future questions on state succession

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19/ Tran Qui Than v. Blumenthal, 469 F. Supp. 1202, 1211-1212 (N.D. Ca. 1979).

and treaties may be settled by the proposed Vienna Convention on Succession of States in Respect of Treaties. 20/

The Reporters' Notes to §345 of the Tentative Draft describes the impossibility of performance as:

> 3. *Impossibility.* According to the Report of the International Law Commission (U.N. Doc. A/6309 (1966)), p. 84, Article 61 setting forth the rule on impossibility was concerned with such cases as "the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty." Apparently, then, it does not reach cases involving not the disappearance of a particular object, but situations in which a party's performance is made impossible by other factors, for example, an agreement to deliver aid, arms or other goods at a specified time that is thwarted by acts of God, war, or the closure of a canal. In this respect it is narrower than the analogous doctrines of impossibility and frustration in domestic contract law. See 18 Williston, Contracts §§ 1931-1979 (3d ed. Jaeger, 1978).

Whole or Partial Terminstion or Suspenaion

The Vienna Convention provides in Art. 44 for separability:

> ARTICLE 44
>
> *Separability of treaty provisions*
>
> 1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.
>
> 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.
>
> 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
>
> (*a*) the said clauses are separable from the remainder of the treaty with regard to their application;
>
> (*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
>
> (*c*) continued performance of the remainder of the treaty would not be unjust.
>
> 4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.
>
> 5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

20/ 17 ILM 1488 (1978).

Consequences of Termination and Suspension

The pertinent provisions of the Vienna Convention read as follows:

ARTICLE 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

ARTICLE 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

* * * *

2. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

ARTICLE 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

ARTICLE 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

No comparable provisions appear in the Restatement, but the Tentative Draft provides:

§ 350. Consequences of Termination of an Agreement

Unless the international agreement otherwise provides or the parties otherwise agree, the termination of an agreement under its provisions or in accordance with Part III of this Restatement (a) releases the parties from any obligation further to perform the agreement; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the agreement prior to its termination.

§ 351. Consequences of Suspension of Operation of an Agreement.

(1) Unless the international agreement otherwise provides or the parties otherwise agree, the suspension of the operation of an agreement under its provisions or in accordance with Part III of this Restatement: (a) releases the parties between which the operation of the agreement is suspended from the obligation to perform the agreement in their mutual relations during the period of suspension; (b) does not otherwise affect the legal relations between the parties established by the agreement.

(2) During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the agreement.

Daniel Hill Zafren
Specialist in American
Public Law
American Law Division
April 16, 1982

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

February 8, 1982

TO : [redacted]

FROM : American Law Division

SUBJECT : The Proposed Extradition Treaty Between the United States and the Philippines - A Legal Analysis

This memorandum is submitted in response to your request for a legal analysis of the recently concluded extradition treaty between the United States and the Republic of the Philippines. No in force extradition treaty presently exists between the two nations. The prospect that this treaty will become effective has apparently raised some concern among certain Philippine dissidents presently within the United States (a copy of a Washington Post article, January 3, 1982, p. A2, thereon is enclosed).

The legal analysis undertaken here has been made primarily from the mere reading of this proposed treaty, and comparing it when deemed relevant to other recent bilateral extradition treaties approved by the Senate or pending before that body, as well as with the model bilateral treaty on mutual extradition of fugitives set forth by the Department of State for comment in 1976 (41 Fed. Reg. 51897-51899; Digest of Practice in International Law, 1976, pp. 132-137). Germane provisions or effects of United States law, present and proposed, are also considered. It should be kept in mind that any treaty is the product of negotiation, and we are not privy to this process here to account for any provision in the treaty which may have in fact been a compromise position for the United States rather than its first asserted stance. Further, extradition treaties do account for certain differences in and peculiarities of domestic law, and we

are not conversant with Philippine law which may have led to the inclusion of new concepts or the exclusion of those found in other similar bilateral treaties. In addition, any analysis of a specific extradition treaty must include the kinds of criticisms that have been raised at the so-called modern extradition treaties as a general category. It should be noted at the outset that most of the provisions and concepts in the proposed treaty do comport with current United States practice and philosophy.

With these caveats in mind, a number of potential legal problems can be pointed to in the proposed treaty. First, is the political offense exception, including the specific reference to the Executive Authority of the requested State in deciding the question of applicability. Second, is the military offense exception, with a legal cloud surrounding the scope and effect of Philippines' martial law, and the ambiguity as to which nation decides questions pertaining to it. Third, is the inclusion of the category of "an accessory after the fact." Finally, there is the weakness in using terms without defining them, such as "deprivation of liberty." Certain legal practicalities are also examined.

The Nature and Purpose of Extradition Treaties

"Extradition is the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial and punishment." 6 Whiteman's Digest of International Law 727 (1968). It is established practice that nations have a right to grant asylum and refuse extradition, but may voluntarily relinquish this general right for a specific treaty obligation that requires extradition. This obligation has usually been incurred through the bilateral treaty method.

Cantrell, The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland, 30 MARQ. L. REV. 777, 783 (1977). However, there are an increasing number of in force or proposed multilateral treaties which deal with extradition or contain extradition provisions.

The United States is a Party to over ninety existing bilateral extradition treaties. That large number is attributable to the fact that the United States may extradite only by treaty when it is the requested State. 18 U.S.C. §3181. When the United States is the requesting State, it can also seek extradition on the basis of comity with those nations where no extradition treaty exists, but Congress has not given the Executive Branch power to reciprocate in effecting such discretionary extraditions. See, Annotation: Extradition of Federal Criminal Defendants Based on Comity of Nations, 24 ALR Fed. 940.

Certain principles or concepts are usually found in the bilateral treaties to which the United States is a Party which aid in effectuating the reciprocity of obligations contained in the treaty and to protect the individual rights of any individual involved or special interests of the Parties. Notable in this regard are: the principle or rule of "speciality," which requires that extradition is proper only for crimes listed in the treaty and persons are not to be detained, tried or punished for an offense other than that for which extradition has been granted; the principle of "dual criminality," holding that extraditable crimes include only those made criminal under the laws of both Parties (and usually punishable by deprivation of liberty for more than a year); exemptions for political and military offenses; no double jeopardy; discretion as to extradition of nationals; applicability of the requesting State's statute of

limitations; the documents required of the requesting State; and the standard of evidence in accordance with law of the place where the person is found.

Current United States Procedure for Extradition

The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181–3195. In brief, the statutes require that a country seeking extradition of an individual submit to our government through proper diplomatic channels a request for extradition. That request must in general be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable offenses in the Treaty and that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States. After evaluation and approval by the Department of State, the necessary papers may be forwarded to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney may then file a complaint and seek an arrest warrant from a magistrate. If a warrant issues the magistrate then conducts a hearing under 18 U.S.C. § 3184 to determine "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention...." The Federal Rules of Evidence and Criminal Procedure do not apply in such a hearing. Fed.R.Evid. 1101(d)(3); Fed.R.Crim.Proc. 54(b)(5). It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing. The person charged is not to be tried in this country for crimes he is alleged to have committed in the requesting country. That is the task of the civil courts of the other country.

Under § 3184, should the magistrate either determine that the offense charged is not within a treaty's terms or find an absence of probable cause, the magistrate cannot certify the matter to the Secretary of State for extradition. If the case *is* certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender. See 4 G. Hackworth, Digest of International Law, § 316, pp. 49–50 (1942); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962).

The government cannot take a direct appeal from the magistrate's decision not to certify the case. There also is no statutory provision for direct appeal of an adverse ruling by a person whose extradition is sought. Instead, that person must seek a writ of habeas corpus. *Collins v. Miller*, 252 U.S. 364 (1920); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976). The scope of habeas corpus review in extradition cases is a limited one, according due deference to the magistrate's initial determination. *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925). *See In the Matter of Assarsson*, 635 F.2d 1237 (7th Cir. Oct. 31, 1980); *Laubenheimer v. Faetor*, 61 F.2d 626 (7th Cir. 1932); *Ornelas v. Ruiz*, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1896). The district judge is not to retry the magistrate's case.

> "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there is *any evidence* warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. at 312, 45 S.Ct. at 542 (per Holmes, J.) (emphasis supplied). The magistrate is obliged to determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. 18 U.S.C. § 3184; *Benson v. McMahon*, 127 U.S. 457, 462-63, 8 S.Ct. 1240, 1243, 32 L.Ed. 234 (1888); M. C. Bassiouni, International Extradition and World Public Order 516-18 (1974) (hereinafter cited as "Bassiouni"). The extradition process has not been challenged in this case by petitioner, but the government has raised a question about the scope of the magistrate's authority.

Eain v. Wilkes, 641 F.2d 504, 508-509 (7th Cir. 1981), cert. den. ____ U.S. ____ (1981).

The Political Offense Exception

The traditional justification for the concept of prohibiting the extradition of political offenders "has been the presumption that the delivery of political enemies to a requesting state would result in their trial being influenced by political considerations. This historical presumption was bolstered by an unwillingness to become entangled in the requesting state's internal affairs, and an increased acceptance of the democratic view that a person should be entitled to resort to political activity in his quest for governmental change." Cantrell, The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland, 30 MARQ. L. REV. 777, 782 (1977).

> Stetes which have invoked the politicel offeose exceptioo have done eo based upon their beliefs ebout human rights end politicel freedom. A principsl justificatioo underlying the exception is s humane concero that eo individual ehould not be returned to his oetive land to undergo a trial prejudiced by political coosiderations. By exemptiog all political offenders from extredition, a nation may elso echieve the deeirable goel of evoiding entenglement in the internel politicel effeirs of other stetee. At the same time, the exception comports with the widespreed ecceptence of the indiviguel's right to resort to political ectivism to foster political change. Finally, the cooflicting politicel ideologiee of stetes have led to a eituetion in which ettecks on the euthority of one state need oot be perceived es a threat to the sovereignty of another.
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> * * * * *
>
> The political offense exceptioo todey reflects a widespreed consensus thet politicel offenses ere somehow more legitimete than ordinery criminsl offeosee. Cooeequently, e speciel effort is msde to identify the politicel offender and protect him from extradition.
>
> Note, American Courts and Modern Terrorism: The Politics of Extredition, 13 N.Y.U.J. INT'L & POL. 617, 622-623 (1981).

Io the proposed extradition treaty with the Philippioes, the politicel offense exception is found in Article 3(1) aod (2):

(1) Extredition shell not be grented if the offense for which it is requested is a political offenee or is coonected with e politicel offense. Nor ehall extradition be grented if there ere substentiel grounds for believing that the request for extraditioo has, io fect, been made with e view to try or punish the persoo sought for such en offense. If eoy question erisee ae to the epplicetion of thie paragraph, it ehall be the respooeibility of the Executive Authority of the Requeeted Stete to decide.

(2) For the purpose of this Treaty, tha followiog offenses shall not be deemed to be the offenses withio the meaniog of paragraph (1):

> (a) the murder or other willful crime agaiost the life or physical integrity of a Head of State or Government of ooe of the Cootracting Parties or of a member of his family;
> (b) ao offeose with respect to which either Cootracting Party has the obligation to prosecute or extradite by reasoo of a multilateral interoational agreemeot.

Paragraph (2) does oot seem to be of any special legal concern, as it is a provision that has appeared io other recent extradition treaties, sometimes with a variant, and is ao attempt to limit the scope of the exceptioo by excluding from the cstegory of political offenses those offenses which a Party has ao an obligatioo to prosecute by reasoo of a multilateral ioternatiooal agreemeot. See, Extraditioo Treaty with the Federal Republic of Germany, approved by the Seoate oo November 29, 1981 (Ex. A, 96th Cong., 1st Sess.).

Paragraph (1), however, while oo first blush not drsaticslly different either from the model treaty or other receot treaties, does contain two concepts which are legslly problematical aod does oot contsio certain concepts or stsndards found in other treaties either io the ralevant or accompaoying provisions.

This political offense exemption, as is true with <u>all</u> other existiog United States extradition treaties, does oot defioe the term "political offeose." Likewise, no legislative criteris has been established, although proposals are curreotly receiving serious attentioo by the Congress (which will be discussed lster io this memorandum in aoother consideration). Thia has left it to the courts to wrestle with the issue. There is apparent agreement that "pure political offenses," crimes such as treason, sedition aod espionage, which are

directed against a particular sovereign and not against private rights, justify protecting an offender from extradition. The problem heretofore, and the present controversy, involves the "relative political offense," which contains criminal and political elements, such as acts of terrorism, which are so intertwined as to cast the entire offense with political overtones. The courts and legal commentators are at odds as to how, who and when such determinations should be made. See, for example, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) and Matter of Mackin, _____ F.2d _____ (2d Cir. 1981), as well as all of the law review articles cited herein. "The absence of a consistent judicial policy for extradition or nonextradition of claimed political offenders demonstrates that serious problems exist with respect to the definition and application of existing standards." Note, Terrorist Extradition and the Political Offense Exception: An Administrative Solution, 21 VA. J. INT'L L. 163, 166 (1980). Again, however, this purported weakness of not defining the term is not peculiar to this proposed treaty.

A clarification of perhaps one aspect of the problem discussed above appears special to this treaty and other very recent and as yet unapproved treaties. The specific reference that any question arising as to the application of the political offense exception is to be decided by the Executive Authority of the requested State, which in the United States is the Executive Branch, while probably consistent with that Branch's philosophy and desire as the way things should be, is contrary to the current state of the law and apparently inconsistent with the notion as found in the model treaty and most other modern extradition treaties.

A. Authority to Determine Extradition Issues as a Matter Within Sole Discretion of Political Branches

The government's argument that the Political Branches should decide the question of whether the crime charged is a "political offense" under the Treaty has no basis in United States case precedent.[11] The government's contention, however, points up an apparent anomaly in the American law of extradition. It is the settled rule that it is within the Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i. e., whether the request is a subterfuge. *In re Lincoln*, 228 F. 70 (E.D.N.Y.1915), *aff'd per curiam*, 241 U.S. 651, 36 S.Ct. 721, 60 L.Ed. 1222 (1916); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962). In contrast, the Judicial branch has consistently determined whether or not the "political offense" provision applies to the crime charged, presumably relying upon the language in 18 U.S.C. § 3184. That section requires a hearing to determine whether there is sufficient evidence "to sustain the charge *under the provisions* of the proper treaty." (Emphasis supplied.)[12] We have not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented. If anything, one of the major criticisms leveled at American extradition law is that federal courts have tended to invoke the political acts exception in situations of common crimes mixed with political overtones upon a showing of "any connection, however feeble" to an uprising or rebellion or condition of domestic violence. *See* Garcia-Mora at 1244; I. A. Shearer, Extradition In International Law 171 (1971) (hereinafter referred to as "Shearer").

Congress originally made the determination that it is for the courts to decide how to apply the exception by making it a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime "under the provisions of" a treaty. The Executive branch has, over the years, implicitly endorsed this approach.[13] The present system of American extradition perhaps may have evolved as a way of providing the Executive some flexibility in decision-making by allowing it to defer to the Judiciary's decision, for example, to refuse extradition of an individual who the Secretary of State is reluctant to extradite anyway. This "permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations." Lubet & Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J.Crim.L. & Criminology 193, 200 (1980) (hereinafter cited as "Lubet & Czaczkes"). *See* Shearer ot 192; Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L. J. 71, 74 (1978). With this background in mind, we consider whether the issues involved in applying the political offense ex-

11. The only case with any similarity which we have found that permits the Executive to make the initial determination in extradition matters that the crime charged was committed and that the person sought to be extradited committed it, *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969), involved a treaty that implicated the "special relationship between the Canal Zone and the Republic of Panama." *Id.* at 686. The court indicated, however, that any Executive determination to extradite still would be subject to review on habeas corpus.

12. A clause excepting political offenses is a "provision" of the treaty. *See generally* cases cited in Note, 62 Colum.L.Rev. at 1322, nn. 73, 74. *Compare Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925) (habeas corpus available to determine "whether the offense charged is within the treaty").

13. Prior to the enactment of the original version of 18 U.S.C. § 3184, the Executive exercised complete control over extradition without reference to the courts. Bassiouni at 505. Thus, from 1794 to 1842 the Executive had unfettered discretion in this area. Immediately upon the statute's enactment, the Executive began a policy of deference to the role of the Judiciary as mandated by Congress. *See* 4 Op. Att'y Gen. 201 (1843).

Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981), cert. den. ____ U.S. ____ (1981).

In this regard, the model treety provides (Article VI (4)):

> 4. No person shall be surrendered if the offense for which his extradition is requested is of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character. If any question arises as to whether a case comes within the provisions of this article, the authorities of the Government on which the requisition is made shall decide.

This point is consistently picked up in later extradition treaties, that it is the requested State that makes the determination of the applicability as opposed to the requesting State. A sampling of subsequent treaties reveals techniques of pointing to the Executive Authority of the requested State to make such determinations with qualifying phrases' such as in accordance with its national laws. The legal effect would be still to follow the procedure provided for in the United States Code. However, it seems that the most recently concluded extradition treaties pending for Senate consideration approximate the concept in the Philippines Treaty, which are apparently designed to remove any decision as to the applicability of the political offense exception from the ambit of the courts. For example, in this context, Article 4(4) of the pending extradition treaty with the Kingdom of the Netherlands (Treaty Doc. No. 97-7) states: "It shall be the responsibility of the Executive Authority of the Requested State to decide on any question raised under this Article, except to the extent that the national laws of that State expressly grant such powers to its courts." The May 4, 1981 letter of submittal by the Department of State describes this provision as follows: "Article 4 gives the Executive Authority of each Party the responsibility of determining whether a request for extradition involves a political or military offense, unless the national laws of the requested Party grant such powers to its courts. In the United States, the laws do not grant such powers to the courts, and the authority, therefore, would rest with the

Executive breoch." The Philippine treety is even more obvious by making it the mandetory ("shell") responsibility of the Executive brench with oo refsreoce et ell to stetute.

There ere many legel remificetions involved concerning this procedure if the treety is epproved eod goes into effect ee is. While it mey eppsar et first glence thet such merely perteins to en internel United Stetes mechanism, it does present substeotiel lsgel eod policy questions in thet regerd es well es s possible effect oo the procedurel sefeguards thet might otherwise be evsilsble to the person eought. First, in this ettempted piece-meel epproech to withdrewiog from the courts coosideretioo of the epplicebility of the politicel offeose exception, would it be self-executing? Would implementing legisletion be necessary, or would the treety operete by virtue of itself? The eoswer is oot clser, eod probably would demeod seperete enelysis and court or legisletive resolutioo. Second, if the Executive would have sole discretioo, what svideotiery steoderds, if eoy, would be eppliceble, end would that discretion be ebsolute? The model treety eod most other treeties provide for allowing the person sought to uss the remedies eod recourse of United Stetes lew, and/or that, in effect, provide for e fioding based on sufficiency of evideoce (probeble ceuse) under federel lew. No such provisioos exist in the Philippines trsety, eod this would seem to mean thet there would be complete and ebsolute discretioo by the Executive Brench to decids if the offeose is e politicel offense or is conoectsd with e politicel offeose. There would be no judiciel review eveilsble. Thus, it could be ergued that there is io this regsrd no Americen due process of lew provided for the person sought, en ergument with definite constitutional overtooes.

From a humao rights perspective, ao interesting observation is that the recent extraditioo treaties with the Scandinaviao countries (e.g., with Norway, Exec. CC, 96th Cong., 1st Sess. aod with the Kiogdom of the Netherlands, Treaty Doc. No. 97-7, 97th Coog., 1st Sess.) provide that the Requested State in the former aod the Executive Authority of the Requested State io the latter, may refuse extradition if it has reason to believe that extraditioo will be io-compatible with humanitarian considerations. The letter of submittal in the case of the Norway treaty gives the followiog humanitarian examples: "having regard to the age, health or other personal conditioos of the persoo sought." The ioclusioo of this appareotly unique coocept in the treaties with this group of natioos does oot seem to be explaioed, aod it very well may be due to some special requirements of their laws, their iosistence in iocluding it, or some elemeot appeariog in the oegotiating process.

The Military Offense Exception

Article 3(3) of the proposed extraditioo treaty with the Philippines provides: "Extraditioo also shall not be granted for military offenses which are not punishable under noo-military peoal legislatioo. It shall be the responsibility of the Executive Authorities of the Contracting Parties to decide any questioo arising under this paragraph." The exact ramifications of the first senteoce are difficult to determioe. Article 21 of the treaty makes the treaty applicable to offeoses committed before it eoters ioto force. Martial law was declared io the Philippioes on September 21, 1972, aod was just recently lifted. Most modero extradition treaties use the term "pure" military offenses. It would seem that a separate study would be necessary, with ao expertise in Philippine law, to attempt to ascertaio the precise scope aod effect of

"military" offenses and their non-relation to "pure" military offenses (which usually have meant a relationship to the international laws of war), and the applicability of non-military penal legislation, and especially the scope and effect of the military law that had been imposed and the extent and conditions under which it was lifted. What appears to be a pronounced legal complexity, particularly in light of the immediate discussion, is the second sentence. Clearly distinguishable from the political offense exception, and what seems to be novel with this treaty, is the leaving of any question under this exception to be decided by both parties Executive Authority. There are no guidelines as to how each nation is to participate in such a determination or which one would prevail.

An Accessory After the Fact

Article 2(4) of the proposed extradition treaty provides that subject to the rule of speciality and the principle of dual criminality, "extradition shall also be granted for conspiring in, attempting, or participating in, the commission of an offense, or for being an accessory after the fact" (emphasis added). This category of "accessory after the fact" does not seem to be a common feature for extradition treaties. It is not contained in the model treaty or in several other recent extradition treaties examined. While this addition might be attributable to a special requirement of Philippine law and is subject to certain safeguards in the treaty itself, it might be argued that at the least this is an unwarranted philosophical expansion to include as a person sought one who is not a principal in the criminal conduct involved.

> An accessory after the fact is one who, knowing that a crime has been committed, obstructs justice by giving comfort or assistance to the offender in order to hinder or prevent his apprehension or punishment. The offense thus can occur only after the substantive crime has been committed and is in no way an element of the crime.... The giving of refuge or other assistance in escaping punishment to one who has committed a crime bears no relation to the ingredients of the substantive crime.
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> Government of Virgin Islands v. Aquino, 378 F.2d 540, 553 (3d Cir. 1967).

Deprivation of Liberty for One Year

Article 2(3) of the proposed treaty provides that extradition shall be granted in respect of an extraditable offense only if the possible penalty under the laws of both Contracting Parites is deprivation of liberty for a period exceeding one year. This is a common provision in modern extradition treaties, but is still susceptible of the legal criticism that "deprivation of liberty" is not defined. It is therefore not clear whether situations other than prison are included. Recent Developments--United States--Japan Extradition Treaty, 21 HARV. INT'L L.J. 540, 542 (1980).

Modification Or Abrogation of Treaty by Domestic Law

If the proposed treaty were to become effective, the legal reality might be faced of its modification or abrogation by either party by domestic legislation.

In the 97th Congress, extensive revisions of the extraditon laws of the United States have been proposed. Both the Senate and House Committees on the Judiciary have concluded hearings on different bills covering different approches. Any provision thereof, if contained in a later enactment, or any provision

later devised and becomiog applicable, could affect the scope and effect of the treaty. For example, the House Committee on the Judiciary held hearings on January 26 aod February 3, 1982 on H.R. 5227. Among other things, that bill provides that the courts shall determine aoy issue as to whether the foreign state is seekiog the extraditioo for a political offense, and categories are prescribed as normally being included withio or without that term. Obviously, if such a concept were to be enacted, being later in time to the treaty, it would be the supreme law of the land. The treaty Executive right of determination, assuming it had been sustained on any legal challenge, would be usurped by this revised (or returned) procedure.

Options of the Senate Respecting Treaty Approval

The Senate is not required to take any action oo a treaty, and can withhold its consent without offering any reason for doing so. If it decides to give its advice aod coosent to ratificatioo, it can do so just in the form of the treaty as submitted to it. However, it could subject its conseot only on condition that certain reservations, understandings, or declarations be made part thereof.

> *Reservations.* A reservation modifies or limits the substantive effect of ooe or more of the treaty provisions. A reservation is a condition that adds somethiog of substance to the treaty or takes something of substance from it, aod gives notice thot the reserving state will not give effect to the treaty except oo such conditions.
>
> The most frequent kiod of reservation is a brief stotement that the United States does oot adhere to a particular article, or tu o clouse withio on article. The effect is to remove the oldigotioo contained in the provision from the treaty. . . .
>
> *Understandings.* The term "understanding" is used to designate a statement which is not intended to modify or limit any of the treaty provisions. It may clarify, or interpret one or more provisions of the treaty, or incorporate a statemeot of policy or procedure. . . . Technically, a true understanding need not be accepted by the other party for the treaty to enter into force. As with a reservation, if so understanding odopted by the Senate is agreed to by the President and the other party to a bilateral treaty, it will have full force and effect and will be controlling io the treaty relationship.

> *Declarations.* The terms "declaration" or "statement" are also used to give notice of certain matters of policy or principle, without in any way derogating from or varying the substantive rights or obligations stipulated in the treaty. These terms are frequently used interchangeably with the term "understanding." Other terms occasionally used may be "clarification," "interpretation," or "protocol."
>
> The legal significance of a Senate statement, no matter what its designation, depends entirely upon its substance. A statement that modifies, limits, or changes the treaty text or meaning is a true reservation; a statement that clarifies or explains, or deals with an incidental matter, does not change the treaty and is therefore not a reservation.
>
> On occasion it may be difficult to distinguish clearly between an understanding and a reservation. The one may gradually shade into the other, and it becomes a matter for the parties themselves to decide. The designation "reservation" or "understanding" used by the Senate will of course provide some evidence as to the Senate intent. But the label is not conclusive. The other party or parties to a treaty may view as a reservation what we have called an understanding, or vice-versa.'
>
> U.S. Department of State, 1977
> Digest of United States Practice
> in International Law, at 375-377.

In fact, the Senate did recently give its advice and consent to a Tax Convention with the Republic of the Philippines subject to two reservations and two understandings. Exec. Rep. No. 97-39.

There is even authority to the effect that the Senate can impose a condition on its consent that is unrelated to the treaty. See, L. Henkin, Foreign Affairs and the Constitution (1972), at 135-136. For a discussion as to the possibility of the Senate consenting to a treaty on the condition that the ratification not be deposited until implementing legislation was in effect, see Nairobi Protocol to the Florence Agreement: Hearing Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. (1981).

If any reservations, understandings, and declarations are adopted by the Senate, the President can reject them and return the treaty to the Senate for further consideration, or he can decline to execute the instrument of ratification in which event there will be no treaty with regard to the United States. If the President accepts them, he will sign the instrument of ratification which

is prepared by the Department of State aod which contains the full text of the reservations or understandings adopted by the Senate. In legal effect, the instrumeot then becomes a counter-offer.

The Senate cao also pass a resolution expressiog its opioion as to the treaty and requesting certain actioo by the President. For example, it could express its disaatisfaction with the treaty because it lacks or contains proviaions on certain apecific or general matters and requesting the President to renegotiate its terms. Such a Resolution, of courae, doea not bind the Presideot to any courae of action.

The Seoate cao, in conjuoctioo with the House, pass a law after the treaty is in force which in effect could modify its terms.

Options of the House of Representatives Respecting Treaty Approval

The House does not have any specific constitutional authority to approve treaties. Aa far as a bilateral extradition treaty is cooceroed, its authority or influence would be limited to declining or impeding its implementation, for example, if appropriations were needed or if further legislation is required to carry it into operation. If could also, with the Senate, enact a law which might effectively modify its terms. Likewise, it could paas a Resolution expressing its opinion as to the treaty and calling upon the President to take certain action with respect to it. In addition, it seems it can paas a resolution, a privileged resolution of inquiry directing the Department of State to furnish to the House certain information concerning a particular extradition. See, Cong. Rec. H 102-107, daily ed. Jan. 28, 1982.

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RE: LLS 82-66
EXTRADITION

Attention: David Beier

Dear Mr. Rodino:

In response to your October 15, 1981 telephone request, the staff of the European Law Division and the Hispanic Law Division have prepared the enclosed reports dealing with extradition and specifically with what governmental authority in the referral foreign state has the responsibility for determining whether the crime is a political offense. Reports from the American-British Law Division will follow.

Please let us know if we can be of further assistance.

Sincerely,

Carleton W. Kenyon

Carleton W. Kenyon
Law Librarian

Enclosures

Honorable Peter W. Rodino, Jr.
Chairman, House Committee on
the Judiciary
House of Representatives
207 Cannon Building
Washington, D. C. 20515

EXTRADITION

Prepared by Members of the Staff

October 1981

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EXTRADITION
82-66

ARGENTINA

Basic provisions on the extradition of criminal offenders by request of foreign authorities are found in the Code of Criminal Procedure for Federal Justice. This code was enacted by Law 2372 of October 17, 1888.[1/] The corresponding passages were amended by Law 4055 of January 11, 1902.[2/]

Extradition of offenders when requested by another nation's authorities may be granted in accordance with the terms agreed upon between Argentina and the nation involved. If no standing international agreement exists, and if the extradition requested is legally acceptable, it may be granted on the grounds of either reciprocity or the uniform practice of nations.[3/] Cases in this latter category must be submitted through diplomatic channels and processed in accordance with the provisions of the code.[4/]

The executive branch is empowered to either accept or reject these requests under the advice of the Attorney General.[5/] If accepted, the request and supporting documents must be assigned to a competent federal judge with territorial jurisdiction over the domicile of the offender.[6/]

The court decides on whether extradition may be granted. This decision may be taken on appeal for review directly to the Supreme Court.[7/]

1/ V. Zavalía, Código de Procedimientos en lo Criminal para la Justicia Federal (Buenos Aires, 1974).

2/ Digesto Ediar Leyes Nacionales 4049-9502.

3/ Supra note 1, art. 646.

4/ Id. art. 648.

5/ Id. art. 652.

6/ Id.

7/ Law 4055, art. 659.

Tha decision, onca it becomas final, is sent to the executiva brsnch, namely, tha Ministry of Foraign Affairs, for the enforcement of the extrsdition order and if requestsd, the delivsry of the prisoner.[8/]

Tha languags of the statute does not make any specific refarences to tha exclusion of political or any other type of criminal offenses. Naverthelass, several decisions rendered by the National Supreme Court have clearly made such distinctons. The benefit of this exclusion in favor of the offsnders has basn limited to offenses "attacking only the internal regime of governments and which were inspirad by altruistic motives," however. This benafit was denied to offandars whose actions are characterized as "grave crimes from sither the legal or moral point of view."[9/]

Other decisions excluded political offanses such as tarrorism, war crimas, and ganocide, as well as the massivs axtermination of the mentally ill from tha benefit of tha "political offense" exemption.

Under the genaral provisions of the lsw, both Argentinian and aliens may ba subject to extradition.

In the specific case of the Argentine-U.S. relationship concarning extradition, both parties are bound by a standing agreement.[11/] Under the terms of this treaty, offenses penalized by the military codas exclusively,

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8/ Código Procedimentos Criminales art. 659. Also, VIII J. A. Claria Olmedo, Tratado de Darecho Procesal Penal 120 (Buenos Aires, Ediar, S.A., 1968)

9/ Among others, Decision of August 24, 1966, 124 La Ley 263 (Supreme Court and Decision of March 26, 1965, 119 La Ley 1 (National Criminal Chamber).

10/ Decision of March 22, 1966, 966-II Jurisprudencia Argentina 351 (National Criminal Chamber and Decision of August 24, 1966, 124 La Lay 263 (National Supreme Court).

11/ 23 UST 3501.

and offenses of a political character, are exempted from extradition. The determination of these exemptions is entrusted to the judiciary.

In view of the above, and considering the existence of a binding treaty between Argentina and the U.S., the decision concerning the political or military character of an offense is a judicial prerogative. This is so because the provisions authorizing the executive to make a preliminary decision to accept or reject an extradition request controls only situations not covered by a standing treaty.

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October 1981

AUSTRIA

In Austria, the power to grant or refuse extradition requests is divided between the courts and the Federal Minister of Justice. The decision on the political nature of the crime for which extradition is sought is made primarily by the court. If it finds that the request is based on a political crime, its decision becomes binding on the Federal Minister, who in turn must refuse the request. However, even if the court finds extradition permissible, the Federal Minister of Justice has the power to deny it for a variety of broadly stated policy reasons, and the political conduct or orientation of the person for whom extradition is sought may well be considered in this context.

In Austria, extradition is regulated in the Statute on Extradition and Legal Assistance in Criminal Matters of 1979.[1/] Its provisions are further implemented by an internal regulation of the Federal Ministry of Justice.[2/] In addition, Austria has concluded extradition treaties with many countries. The procedural aspects of the Extradition Statute are applicable to all extradition proceedings, but its substantive provisions are applicable only to the extent they are not derogated by a treaty.

The Extradition Statute distinguishes between the permissibility of extradition--to be established by the courts--and the authorization to extradite--to be granted by the Federal Minister of Justice. He has the power to

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1/ Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen [ARHG], Bundesgesetzblatt [BGBl., official law gazette of Austria], No. 529.

2/ Erlass vom 5. Mai 1980 zur Einführung des Auslieferungs- und Rechtshilfegesetzes, Amtsblatt der österreichischen Justizverwaltung, No. 15 (1980).

refuse extradition immediately, when obvious reasons for it exist.[3/] These are: the unsuitability of the request for treatment of it according to law, lack of reciprocity, and the public policy reasons stated in section 2 of the Extradition Statute:

General Reservation

> Sec. 2. A foreign request [for extradition] may be granted only if the public order or other substantial interests of the Republic of Austria are not violated. [4/]

When the extradition request is not denied ab initio in this manner, a court proceeding must ensue. The competent court is the Court of First Instance [Gerichtshof], and venue is established by the location of the person to be extradited. The investigative judge has to interrogate the person whose extradition is sought and inform him of his rights. The person to be extradited may consent to the extradition, in which case the records will be submitted directly to the Federal Minister of Justice. But if the person contests extradition, the Chamber of Council of the Court of First Instance will forward the records, together with its recommendation, to the Court of Second Instance. The Court will decide on the permissibility of extradition in a formal court proceeding. No appeal is possible against its decision on permissibility.[5/]

3/ Sec. 30, ARHG.

4/ Translation by Dr. Edith Palmer.

5/ Secs. 26 and 31-33, ARHG.

The statutory criteria for permissibility include not only the traditional exception of political crimes,[6] but also mandate that asylum must be granted when extradition would result in political persecution, irrespective of the nature of the crime for which extradition is sought.[7] Furthermore, extradition is not permissible in hardship cases involving long-term residents, juveniles, or other personal circumstances.[8]

A court decision establishing non-permissibility of extradition must be respected by the Federal Minister of Justice.[9] However, even if the court decision establishes permissibility, the Federal Minister of Justice may deny the authorization. He makes this decision on the basis of the international agreements and principles of international legal assistance. In doing so, he takes into consideration the interests of the Republic of Austria, obligations of international law--particularly the right of asylum--and the protection of human dignity.[10]

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6/ Sec. 14, ARHG.

7/ Sec. 19, ARHG.

8/ Sec. 22, ARHG.

9/ Sec. 34, ARHG.

10/ Id.

BELGIUM

Extradition in Belgium is regulated by the Laws of October 1, 1833, and of March 15, 1874, both as amended.[1/] Belgium will not extradite its own citizens, nor will it extradite foreigners for political offenses.[2/] Extradition may take place only on the strength of a treaty which foreign countries may make with Belgium. In making extradition treaties, the Belgian government is bound by the above statutes. Consequently, every extradition treaty made by Belgium includes a clause providing that "the provisions of this treaty shall not be applicable to persons guilty of any political crime or offense or of one connected with such a crime or offense." The text of the clause is taken from article 6 of the Law of October 1, 1833.[3/] Such a clause also appears in article 4 of the Extradition Treaty between Belgium and the United States.[4/]

Extradition is an act of sovereignty and is exercised by the Belgian government.[5/] Any request for extradition must be directed to the Belgian government through diplomatic channels and will be transmitted by the Ministry of Foreign Affairs to that of Justice.[6/] In turn, the Ministry of Justice

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1/ J. Servais and E. Mechelynck, comps., 2 Les Codes Belges 479 (Bruxelles, Bruylant, 1980).

2/ Law of October 1, 1833, art. 6; Law of March 15, 1874, art. 1.

3/ Id.

4/ Treaty for the Mutual Extradition of Fugitives from Justice, signed at Washington, October 26, 1901; entered into force July 14, 1902, 32 Stat. 1894; TS 409; 5 Bevans 508.

5/ 5 Répertoire pratique du droit belge 289 (Bruxelles, Bruylant, 1950).

6/ Id. at 295.

depends upon the courts for advice on the request,[7] but the final decision is a political one made by the Belgian government on the advice of the Minister of Justice and is communicated to the foreign government by the Minister of Foreign Affairs through diplomatic channels.[8] The decision whether the offense is political is thus made by the Belgian government within the framework of the extradition proceedings.

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7/ Id. at 296.

8/ Id. at 300.

BRAZIL

As a general principle, the Brazilian Federal Constitution provides that extradition is not granted when such a request concerns either a foreigner charged with "political crimes" or with offenses related to the freedom of expression (opinião), or when the extradition concerns a Brazilian citizen.[1/]

Requests for extradition within the context of the national charter are assigned to the exclusive competence of the Supreme Federal Tribunal.[2/]

The legal viability of an extradition request requires a pronouncement by the Supreme Federal Tribunal before it can be proved. There are no recourses against the Supreme Federal Tribunal's decision available under this ststute, and it is therefore final.[3/]

The basic principle underlying extradition in Brazilian law was implemented by Decree-Law 941 of October 13, 1969,[4/] and further regulated by Regulatory Decree 66,689 of June 11, 1970.[5/] Both statutes refer to the specific content of standing international treaties and agreements between Brazil and otber countries. Brazil and the U.S. have entered into a treaty on the matter which has been ratified by both parties in 1961 and 1964 respectively.[6/] An examination of this international instrument and its additional protocol does not indicate contradictions or departures from provisions on the subject of Brazilian law.

1/ Constituição da República Federativa do Brasil art. 153 (5. ed. Brasília, Senado Federal, 1980).

2/ Id. art. 119.

3/ 15 UST 47.

4/ 7 Coleção das Leis 136-154. In force as of January 1, 1970.

5/ Carteira Forense Konfino 2224-2246 (2.ed. Rio de Janeiro, José Konfino, 1978).

6/ 15 UST 2093 and 2112.

Professor Haroldo Valladão, a well-known authority in the field of international law, states that the initial pronouncement was never understood to include the power to pass judgment on whether to actually grant or reject the request.[7/] Thus, after the highest court of the nation has decided on the issue of legal viability, and if the final decision is favorable to the request, the executive branch, that is, the Ministry of Foreign Relations, will decide on whether or not the prisoner will in fact be delivered.[8/]

Nevertheless, the letter of the basic statute, Decree-Law 941, is clear as to what this pronouncement should entail. Political crimes and offenses related to the freedom of expression are excluded by law from those offenses on which extradition can be granted. Furthermore, the law states that the Supreme Federal Tribunal "may leave out of consideration for this category of exemptions, political offenses such as attempts against chiefs of state or any other person in authority; acts of anarchy, terrorism or sabotage; any action relating to warlike or violent propaganda; or to the subversion of the political or social order."[9/] Offenses in these categories may therefore be grounds for extradition.

Neither the Constitution nor the implementing statutes and regulations provide for specific standards to determine precisely what is a "political crime." This is particularly critical in view of the fact that the statute establishes only broad standards for offenses to be excluded from this category.

7/ H. Valladão, 3 Direito Internacional Privado 264-265 (Rio de Janeiro, Livraria Freitas Bastos, S.A., 1978).

8/ Supra note 3, arts. 97-103.

9/ Id. art. 88.

The judicial decision closest to establishing a standard defining the political crime may be found in the decision rendered by the Supreme Federal Tribunal in a case involving the extradition of a "war criminal" requested by three European nations simultaneously. The court elaborated on the concept of political crime by simply stating that such an offense "is founded on the political motivation of the offender". The decision goes on to give some examples of offenses which may not be considered political based on the criterion that they include an element of "barbaric cruelty".[10/]

In view of all of the above, it may be stated that:

a) The decision concerning the legal viability of a request for extradition is a judicial prerogative. This includes the preliminary consideration as to whether the offense with which the prisoner is charged may preclude extradition for the reason of being a political crime with the exceptions noted, and

b) The decision to deliver the prisoner involved, is a prerogative of the executive branch, namely the Ministry of Foreign Relations, provided that the judicial decision was favorable to granting the extradition requested.

Extradition under Brazilian law then is a two-stage process involving, in turn, the judicial and administrative branches of government. If the judicial decision rejects the extradition request, however, the executive has no option in the matter.[11/]

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10/ 221 Revista Forense 275-307.

11/ Supra note 7 at 267-268.

CHILE

I. Who Grants Extradition?

Extradition is governed by the Code of Criminal Procedure[1/] in articles 644 to 656 which are paraphrased as follows. Whenever a foreign government requests the extradition of individuals in the Chilean territory who are being prosecuted or have been sentenced, the Ministry of Foreign Affairs submits the records it and submits it to the Supreme Court. If the Ministry of Foreign Affairs has ordered the detention of the accused, according to existing treaties, that person will be brought and committed to the President of the Supreme Court.[2/] The President of the Supreme Court decides in the first instance on the extradition request,[3/] and if necessary may also order the detention or imprisonment of the accused.[4/] The investigation focuses on the following elements:

1) To establish the identity of the accused;

2) To establish if the crime charged is one that allows extradition extradition according to the treaties in force, or in the absence of a treaty, in accordance with the principles of international law; and

3) To establish if the accused person has committed or has not committed the crime of which he or she is accused. [5/]

1/ Código de Procedimiento Penal [C. Pro. P.] [8. ed. oficial, Santiago, Editorial Jurídica de Chile, 1979].

2/ Id. art. 635.

3/ Id. art. 644.

4/ Id. art. 645.

5/ Id. art. 647.

After hearing the Public Attorney, the legal representative of the requesting government and the defense of the accused, the President of the Supreme Court makes a decision within a five day term.[6/] On appeal, the full court decides on the request of extradition.[7/]

II. What constitues a political offense?

The government of Chile is a signatory of a number of bilateral and multilateral conventions on extradition all of which establish that extradition cannot be granted for poltiical offenses and actions related to a political offense.[8/]

The determination of whether a crime in question is a political offense is made by the requested country. However, no proviaions have been found either in treaties or in the Chilean national legislation defining a political offense within the context of extradition. The Código de Bustamente[9/] establishes that the assassination, murder, or poisoning of the head of state

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6/ C. Pro. P., arts. 652 and 653.

7/ Id., arts. 653 and 654.

8/ E. Gaete G., La Extradición ante la Doctrina y la Jurisprudencia (1935-1965) (Santiago, Editorial Andrés Bello, 1972): Código de Bustamante of 1928 (ratified 1934); Montevideo Convention of 1933, Caracas Convention on Diplomatic Asylum. Argentina (1869 and 1935); United Kingdom (1897, extended to the Commonwealth countries in 1934 and 1937); Uruguay (1897); Ecuador (1897); Spain (1847); Paraguay (1897); USA (1900 and 1901); Belgium (1899); Bolivia (1910); Colombia (1914); Peru (Border Police, 1930, extradition, 1932); Venezuela (1962).

will not be considered a political offense regardless of the motivation of the offender. Thus, what does not constitute s political offense has been defined by the law.[9/]

Through the years, the Chilean Supreme Court has construed the concept of political offense and acts related to political offenses through several decisions. The Supreme Court's decision of September 24, 1957, Argentina v. Héctor Cámporas and others,[10/] address the matter of the extradition of political offenders extensively. The most pertinent passsges sre paraphrased as follows:

5. Political offenses have not been defined in our lsw nor in conventions or international treaties, but the principles generally accepted coincide in stating that a political offense is a trsnsgression against the political organization of the State or the political rights of the citizens and that the normal constitutional order is affected. The actions whose purpose is the alteration of the political or social order of the country are also considered political offenses.

It is also pertinent to distinguish between common and political offenses and take into account the purpose and motivations of the accused, that is, to consider the objective and subjective elements of the offense. Political and social offenses relate to motives of political or collective

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10/ LIV Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales 197. (Chile, 1957)

9/ H.P. de Vries and J. Rodriguez N., The Law of the Americas 87 (Dobbs Ferry, New York, Oceans Publications, Inc., 1965).

interests and are characterized by altruistic or patriotic sentiments. Common offenses are pervaded by selfish but excusable sentiments like love, honor or inexcusable ones like revenge, hate or greed.

The Court further describes in detail a variety of behaviors and situations which constitute pure political offenses (delitos políticos puros); improper political offenses (delitos políticos impropios); joint or complex political offenses (delitos políticos complejos); and connected offenses.

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FRANCE

The Law of March 10, 1927, esteblished the basic rules applicable to extredition in the absence of e bileterel convention.

Extradition for political reasons is banned by article 5(2) of this lew which stipulates that extradition is not granted when "the crime or offense has e political character or when it is clear (resulte) from the circumstances that the extradition is requested for a political end."*

The Court (Chambre de mises en accusetion) decides whether or not the offense is of a politicel nature. If this court denies the request for extradition, the decision is final end is binding to the Government, even if the court-reasoned decision is based on the political nature or the eccusation or eny other grounds. The decision is without eppeal. However, if the Court grants the extradition, the Government is free either to extradite or not to extredite the eccused or convicted person.

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* Law of March 10, 1927, 29 American Journal of International Law 380 (1935). (See Appendix.)

Appendix

SUPPLEMENT

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TITLE I

CONDITIONS OF EXTRADITION

Article 1. In the absence of a treaty, the conditions, the procedure and the effects of extradition are determined by the provisions of the present law.

The present law applies as well to matters which are not regulated by treaties.

Art. 2. No surrender may be made of persons of a Foreign government who have not been the object of prosecution or conviction for an offense envisaged by the present law.

Art. 3. The French Government may deliver to foreign Governments, at their request, every person not French or French *ressortissant*, who, being the object of prosecution initiated in the name of the requesting State or convicted by its tribunals, is found in the territory of the Republic or of its colonial possessions.

Nevertheless, extradition is granted only if the offense which is the basis of the request has been committed:

Either within the territory of the requesting State by a subject of that State or an alien;

Or outside of its territory by a subject of that State;

Or outside of its territory by a person, an alien to that State, when the offense is one of the number of those of which the French law authorizes prosecution in France, even though they have been committed by an alien abroad.

Art. 4. The acts which may give rise to extradition, whether it is a question of requesting it or granting it, are the following:

1. All acts punished by a criminal penalty under the law of the requesting State;

2. Acts punished by a correctional penalty (*peines correctionnelles*) under the law of the requesting State, when the maximum penalty incurred is, by the terms of that law, two years or more, or, in the case of a convicted person, when the penalty pronounced under the law of the requesting State is equal to or greater than two months of imprisonment.

In no case is extradition granted by the French Government if the act is not punished under the French law by a criminal or correctional penalty.

Acts constituting an attempt or complicity are subject to the preceding rules on the condition that they are punishable under the law of the requesting State and under that of the requested State.

If the request is based upon several offenses committed by the person claimed and which have not yet been the subject of judicial determination, extradition is granted only if the maximum penalty incurred under the law of the requested State for these offenses taken together is equal to or greater than two years of imprisonment.

If the person claimed has been previously the object in any country of a final sentence of two months or more of imprisonment for a common offense (*un délit de droit commun*), extradition is granted following the preceding rules, that is to say, only for crimes or offenses without regard to the extent of the penalty incurred by or pronounced for the last infraction.

The preceding provisions apply to offenses committed by soldiers, sailors or the like, when they are punished under the French law as common offenses.

No change is hereby made as to the procedure relative to the surrender of deserting sailors.

Art. 5. Extradition is not granted:

1. When the person, the object of the request, is a French citizen or a person under French protection, the status of citizen or of protected person being determined as of the time of the offense for which the extradition is requested.

2. When the crime or offense has a political character or when it is clear (*résulte*) from the circumstances that the extradition is requested for a political end.

[1] Unofficial translation.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance (*dans l'intérêt*) of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.

3. When the crimes or offenses have been committed in France or in French colonial possessions.

4. When the crimes or offenses, though committed outside of France or the French colonial possessions, have been there prosecuted to final judgment.

5. When, according to the law of the requesting State or according to that of the requested State, prescription of the action has taken effect previous to the request for extradition, or prescription of the punishment has taken effect previous to the arrest of the person claimed and, in general, whenever action on behalf of the requesting State would be extinguished.

Art. 6. If for *a single* offense extradition is requested concurrently by several States, it is granted in preference to the State against whose interests the offense was directed or to the one within whose territory it was committed.

If the concurrent requests have for their bases different offenses, all the circumstantial facts have to be taken into account in order to decide as to priority, especially:

The relative gravity and the place of the offenses, the respective dates of the requests, the obligation which would be undertaken by one of the requesting States of subsequent re-extradition.

Art. 7. Subject to limitation by the exceptions provided for hereafter, extradition is only granted on the condition that the extradited person shall be neither prosecuted nor punished for an offense other than that which motivated the extradition.

Art. 8. In the case where an alien is being prosecuted or has been convicted in France and where his extradition is requested of the French Government because of a different offense, the surrender can be effected only after the prosecution has been terminated and, in the case of conviction, after the penalty has been executed.

However, this provision does not create an obstacle to an alien being sent temporarily in order to appear before the tribunals of the requesting State on the express condition that he shall be sent back as soon as the judicial procedure abroad has been terminated.

The provisions of this article govern the case where an alien is subjected to a writ of arrest for debt (*soumis a la contrainte par corps*), by the application of the laws of July 22, 1867, and December 19, 1871.

TITLE II

EXTRADITION PROCEDURE

Art. 9. Every request for extradition shall be presented to the French Government through the diplomatic channels and shall be accompanied either by a judgment or a decree of conviction, even by default or *par contumace*, or a document of criminal procedure which formally decrees or legally effects the subjection of the person charged or accused to *criminal* jurisdiction (*operant de plein droit le renvoi de l'inculpé ou de l'accusé devant la juridiction repressive*), or by a warrant of arrest, or by any other document having the same force and issued by the judicial authorities, in so far as the latter contain the precise indication of the act on account of which they are delivered and the date of that act.

The papers mentioned above must be produced in original or in authentic copy.

The requesting Government must furnish at the same time a copy of the texts of the law applicable to the act charged. It may add a statement of the facts of the case.

Art. 10. The request for extradition is, after verification of the papers, transmitted together with the papers (*dossier*) by the Minister for Foreign Affairs to the Minister of Justice who assures himself of the regularity of the request and proceeds with it according to law.

Art. 11. Within twenty-four hours of the arrest, the Procurator of the Republic or a member of his staff (*parquet*), shall proceed to the interrogation as to identity, of which there shall be kept a *procès-verbal*.

Art. 12. The alien shall be transferred as soon as possible to and registered in the place of detention in the headquarters (*chef-lieu*) of the Court of Appeals in whose district he was arrested.

Art. 13. The papers furnished in support of the request for extradition shall be transmitted at the same time by the Procurator of the Republic to the Procurator-General. Within twenty-four hours of their receipt the grounds on which the arrest has taken place shall be made known to the alien.

The Procurator-General, or a member of his staff, within the same period shall proceed to the interrogation, of which there shall be kept a *procès-verbal*.

Art. 14. The *Chambre des mises en accusation* has laid before it without delay the mentioned *procès-verbaux* and all other documents. The alien shall appear before it not later than eight days from the receipt of the documents. At the request of the representative of the State or of the person appearing, an additional period of eight days may be granted before the hearing. The court shall then proceed to an interrogation, of which shall be kept a *procès-verbal*. The hearing is public, unless it has been decided otherwise upon the request of the representative of the State or of the person appearing.

The representative of the State and the person interested shall be heard. The latter may be assisted by a licensed lawyer (*avocat inscrit*) and an interpreter. He may be provisionally set at liberty any time during the procedure in accordance with the rules which govern the matter.

Art. 15. If, upon his appearance, the person interested declares his renunciation of the benefit of the present law and consents formally to be delivered to the authorities of the requesting State, he is given by the court a certificate of this declaration.

A copy of this decision shall be transmitted without delay, at the initiative of the Procurator-General, to the Minister of Justice for all practical purposes.

Art. 16. In the contrary case, the *Chambre des mises en accusation* gives its reasoned decision, not subject to an appeal, as to the request for extradition.

This decision is unfavorable if the court finds that the legal conditions are not met or there is an evident error.

The *dossier* must be sent to the Minister of Justice within a period of eight days from the day of the expiration of the period provided for by Article 14.

Art. 17. If the reasoned decision of the *Chambre des mises en accusation* denies the request for extradition, this decision is final and the extradition may not be granted.

Art. 18. In the contrary case, the Minister of Justice, if there is ground for it, submits for the signature of the President of the Republic a decree authorizing the extradition. If within the period of one month from the communication of this document, the extradited person has not been taken by the agents of the requesting power, he is set free, and may not be claimed for the same act (*cause*).

Art. 19. In an urgent case and upon the direct request of the judicial authorities of the requesting country, the procurators of the Republic may order a provisional arrest of the alien upon a simple notice of the existence of one of the documents indicated by Article 9, communicated either by mail, or by any more rapid means of communication leaving a written record (*une trace écrite*).

A regular notice of the request shall be at the same time communicated through the diplomatic channels by mail, telegraph or any means of communication leaving a written record, to the Minister for Foreign Affairs.

The procurators of the Republic must give notice of this arrest to the Minister of Justice and to the Procurator-General.

Art. 20. The person arrested provisionally, under the conditions provided for by Article 12, may, if there is no ground for applying to him Articles 7, 8 and 9 of the law of December 3, 1849, be set at liberty, if the French Government does not receive, within a period of twenty days from the date of his arrest, one of the documents mentioned in Article 9, and if his arrest was effected upon the request of the Government of a bordering country.

The aforesaid period of twenty days may be extended to one month, if the territory of the requesting State is not bordering, and to three months if the territory is outside of Europe.

The liberation shall be pronounced upon a request addressed to the *Chambre des mises en accusation*, not subject to an appeal, within eight days. If eventually the afore-mentioned documents reach the French Government, the procedure is reopened in accordance with Article 10 and those following.

Title III

Effects of Extradition

Art. 21. The person extradited may not be prosecuted or punished for an offense previous to the surrender, other than that which motivates the extradition.

It is otherwise, in the case of a special consent given on the following conditions by the requested State.

This consent may be given by the French Government, even in the case where the act which causes the request is not one of the offenses set forth by Article 4 of the present law.

Art. 22. In the case where the requesting Government seeks authorization for prosecution of the person already surrendered for an offense previous to the extradition, the decision of the *Chambre des mises en accusation* before which the person accused had appeared may be formulated upon mere presentation of the documents communicated in support of the new request.

There shall be communicated as well by the foreign Government and submitted to the *Chambre des mises en accusation* the documents containing the observations of the person surrendered or the declaration of his intent not to present any. These explanations may be completed by a lawyer chosen by him or who is assigned or acts by virtue of his office (*désigné ou commi d'office*).

Art. 23. Extradition obtained by the French Government is null if it has been procured (*intervenue*) in the cases not provided for by the present law.

The nullity is declared by action of the examining authority on its own initiative (*même d'office, par la juridiction d'instruction*), or by a judgment on the motion of the extradited person after his surrender.

If the extradition has been granted by virtue of a judicial decree (*d'un arrêt*) or a final judgment, the nullity is declared by the *Chambre des mises en accusation* in whose district the surrender took place.

The request for nullification formulated by the extradited person is only admissible if it is presented within a period of three days from the communication of the notice sent to him by the procurator of the Republic immediately after he has been taken into custody. The extradited person is informed, at the same time, as to the law which applies to him at his election, or as to having counsel assigned.

Art. 24. The same authorities judge as to the qualification given the acts which have motivated the request for extradition.

Art. 25. In the case where the extradition has been annulled, the extradited person, if he has not been claimed by the requested Government, is set at liberty, and cannot be detained again either for the acts which motivated the extradition or for acts previous to these, except when he is arrested in French territory after thirty days from his liberation.

Art. 26. The surrendered person is considered to be subjected without reservation to the application of the law of the requesting State in respect to any act previous to the extradition and different from the offense which motivated that measure, if he has had the possibility of leaving the territory of that State for thirty days from his final liberation.

Art. 27. In the case when the extradition of an alien has been obtained by the French Government and the Government of a third State solicits in its turn the extradition of the same person from the French Government, by reason of an act previous to the extradition and other than that judicially passed upon in France and not connected with that act, the

Government yields to that request, if there is a ground for it, only after being assured of the consent of the State by which the extradition was granted.

However, this reservation is not applicable when the extradited person has had the possibility of leaving French territory for the period of time fixed in the preceding article.

TITLE IV

CERTAIN ACCESSORY PROCEDURE

Art. 28. Extradition in transit through French territory or by transportation on a vessel of the French maritime services of a person of any nationality surrendered by another Government is authorized upon the mere request presented through diplomatic channels (and) supported by documents sufficient to establish that it does not concern a political or purely military offense.

This authorization may be given only to the Powers which accord within their territory the same privilege to the French Government.

The passage is effected under the direction of French agents and at the expense of the requesting Government.

Art. 29. The *Chambre des mises en accusation* decides whether or not there is ground for delivery to the requesting Government, in all or in part, of papers (*titres*), valuables, money or other seized articles.

Such delivery may take place even if the extradition cannot be effected as a result of the escape or the death of the person claimed.

The *Chambre des mises en accusation* orders the restitution of the papers and other articles enumerated above which do not refer to the act charged to the alien. It decides, if the case calls for it, upon the claim of third persons interested and others having rights.

The decisions provided for by the present article are not subject to any review.

Art. 30. In the case of non-political criminal prosecutions in a foreign State, *commissions rogatoires* by the foreign authorities are received through diplomatic channels and forwarded to the Ministry of Justice in the forms envisaged by Article 10. The *commissions rogatoires* are executed, if there is ground for it and in accordance with the French law.

In a case of urgency, they may be the object of direct communication between the judicial authorities of the two States in the forms envisaged by Article 10. In such a case, the direct communication between the judicial authorities of the two States shall not be acted upon in the absence of a notice given by the interested foreign Government through diplomatic channels to the French Ministry for Foreign Affairs.

Art. 31. When, in connection with a criminal prosecution being conducted abroad, a foreign Government finds it necessary to notify a person residing within French territory of an act of procedure or of a judgment, the document is sent following the forms envisaged by Articles 9 and 10, accompanied, if necessary, by a French translation. The notification is made personally at the request of the public prosecutor by a competent officer. The original with the record of notification is sent back through the same channel to the requesting Government.

Art. 32. When, in a criminal action being brought abroad, the foreign Government finds necessary the communication of records of sentence or documents which are in the hands of the French authorities, the request is made through diplomatic channels. It is acted upon, unless there are particular circumstances opposing it, and under the obligation of sending back the papers and documents as soon as possible.

Art. 33. If in a criminal action the personal appearance of a witness residing in France is judged necessary by a foreign Government, the French Government, having received the summons through diplomatic channels, undertakes to grant the request addressed to it.

However, the summons is received and given effect only on the condition that the witness will not be prosecuted or detained for acts or on account of convictions previous to his appearance.

Art. 54. The sending of detained persons for the purpose of confrontation is to be requested through diplomatic channels. The request is acted upon, unless there are particular circumstances opposing it, and on the condition that the aforementioned detained persons will be sent back as soon as possible.

Art. 55. The governors of French colonies may on their own responsibility, and under the duty of giving account without delay to the Minister of Colonies, decide upon requests for extradition which are presented to them either by foreign Governments or by the governors of foreign colonies.

The request is formulated either by the principal consular agent of the requesting State, or by the governor of the colony.

The request is entertained only on the conditions envisaged by Articles 3, 4 and 5 of the present law. Reciprocity may be demanded.

Moreover, the governors may exercise the rights conferred by Articles 28, 29, 30, 31, 32, 33 and 34.

The present law, debated and adopted by the Senate and the Chamber of Deputies, is to be executed as the law of the State.

Done at Paris, March 10, 1927.

7. Germany

EXTRADITION LAW OF DECEMBER 23, 1929[1]

The *Reichstag* has voted the following law which with the consent of the *Reichstat* is hereby promulgated:

First Section

Extradition and extradition in transit

Article 1. An alien who is sought by the authorities of a foreign State for, or has been convicted of, a punishable act, may be extradited, at the request of a competent authority, to the government of that State for prosecution or punishment.

Art. 2. (1) The extradition is permissible only for an act which under German law is either a crime (*Verbrechen*) or an offense (*Vergehen*).

(2) The extradition is not permissible if the act under German law is punishable only under the Military Penal Law (*Militärstrafgesetzen*), or is punishable only by a fine which may not be converted into a penalty of imprisonment.

Art. 3. (1) The extradition is not permissible if the act which would be the basis of the extradition is political, or if it is connected with a political act in such a manner that it was meant thereby to prepare for, secure, conceal or prevent the latter.

(2) Political acts are those punishable offenses (*Angriffe*) which are directed immediately against the existence of the security of the State, against the head or a member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign States.

(3) The extradition is permissible if the act constitutes a deliberate offense (*Verbrechen*) against life, unless committed in open combat.

Art. 4. The extradition is not permissible:

1. If reciprocity is not guaranteed;

2. If the prosecution or punishment for the act would not be permissible under German law, because of prescription (*Verjährung*), amnesty or other reasons.

3. If the act is within German jurisdiction (*Gerichtsbarkeit*) and a judgment has been rendered by German authorities against the person sought (*Verfolgten*) or if the prosecution has been discontinued before trial.

Art. 5. The extradition is permissible only if there is submitted a warrant of arrest

[1] Reichsgesetzblatt 1, *Teil* 1, 1929, S. 239. Unofficial translation.

FEDERAL REPUBLIC OF GERMANY

In the Federel Republic of Germany, the decieion to refuse extredition because of the political neture of the offense for which it is eought cen he made either by the courte or by the Federel Government, eince for any conteeted extradition to be effected both a court decision on its permieeibility and an euthorizetion by the Federal Government[1/] ere required.

The requirement for e court decision for e conteeted extradition ie provided for in eection 7 of the German Extradition Statute.[2/] Jurisdiction ie vested in the Higher Land Court (Oberlandesgericht) of the place where the eccused ie epprehended or found.[3/] Thie court may ask the Federel Court (Bundesgerichtehof) for e decision if s legal question of fundamental importance needs to be resolved, or if it intende to deviete from a decieion of the Federal Court.[4/]

The courts will decide on the permieeibility of extradition by epplying the pertinent extradition treaty, if the request ie based on one. Germany hae concluded extradition treeties with many nations and, as a rule, they contain provieions on the exception of a political crime. In the ebsence of e treety, the legal basie for the permiseibility of extradition is the German Extradition Statute. Its pertinent eection provides:

1/ In some inetancee, by the land government, but not for political crimes. See the text, pagee 2 end 3.

2/ Deutschee Auslieferungegeeetz [DAG] vom 23. Dezember 1929, Reichsgeeetzblett [official lew gazette of the German Reich] I, p. 239, ae last amended by Geeetz vom 2. März 1974, Bundesgeeetzhlett [BGBl., official law gazette of the Federel Repuhlic of Germany] I, p. 469.

3/ Secs. 8 end 9, DAG.

4/ Sec. 27, DAG.

Sec. 3. (1) Extradition is not permissible when the act for which extradition is sought is a political one or is connected with a political act in such a way that it prepares, secures, or covers it, or guards against it.

(2) Political acts are punishable assaults directed immediately against the existence or security of the state, against its chief or a member of a government of the state in that [official] capacity, against a constitutional corporation, against citizenship rights in elections or referenda, or against good relations with other countries.

(3) Extradition is permissible when the act constitutes a deliberate crime against life, unless committed in open combat.

The provisions of the Extradition Statute will also be applied if there is a treaty, to the extent that the treaty provisions do not diverge from them.[5/]

The requirement for a governmental authorization of extradition is provided for in section 44, Extradition Statute, which vests this power in the Federal Government but grants it authority to delegate this power to the governments of the länder (constituent states of the Federal Republic). On the basis of this provision, an agreement was made in 1952 between the Federal Government and the länder[6/] which grants the latter jurisdiction to decide on extradition requests made by Austria and Switzerland. In 1954, this privilege was extended to extradition requests from Denmark.[7/]

5/ T. Maunz, Bundesverfsssungsgerichtsgesetz, sec. 90, note 71 (München, 1967-).

6/ Zuständigkeitsvereinbarung vom 20. Februar 1952, Bundesanzeiger No. 78.

7/ H. Grützner, Internationaler Rechtshilfeverkehr in Strafsachen I A 3, p. 2 (Hamburg, 1955-).

Even in these instances, however, the Federal Government retains the power to decide on the exception of political crimes because of the foreign policy implications inherent in such decisions. 8/

The extent of the powers of the Federal Government to grant or deny an authorization for extradition differs, depending on whether there is a duty to extradite. In the absence of an extradition treaty, the Federal Government has unlimited discretion to deny extradition. 9/

For such cases, the Guidelines on Legal Assistance in Criminal Matters of 1959 provide that extradition may be refused, even when it is permissible, when the act for which it is sought contains political elements. In such cases, the agency processing the extradition request must report to the competent higher authority and await its decision. 10/

Where a duty to extradite exists (i.e., in the case of a treaty), it has been stated that the Federal Government is bound by the court decision establishing permissibility. 11/

It is noteworthy that the present law may undergo some change in the near future, since a government draft for a Statute on International Legal Assistance in Criminal Matters has almost been completed in the Federal

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8/ Supra note 6, No. 4(b).

9/ Sec. 1, DAG.

10/ No. 17, Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten vom 15. Januar 1959, Bundesanzeiger, No. 9.

11/ W. Mettgenberg, Deutsches Auslieferungsgesetz 497 (Berlin, 1953).

Ministry of Justice. When enacted, this statute will replace the present German Extradition Statute.[12/]

Although extradition decisions of the Federal Government cannot as a rule be appealed,[13/] a review by the Constitutional Court is possible when the accused claims that his constitutional rights have been violated. The basis for such a claim may be Article 16, paragraph 2, of the Constitution,[14/] which grants asylum to politically persecuted persons.[15/]

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12/ Recht, Informationen des Bundesministers für Justiz 27 (1981).

13/ Supra note 11, at 504.

14/ Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949, BGBl., p. 1.

15/ Supra note 5, sec. 90, note 62a.

ISRAEL

Under the provieions of the Israeli Extradition Law, the determination as to whether or not a pereon ie eubject to the political offense exception of eection 10(2) of the Law* ie within the authority of the District Court with e direct eppeal to the Supreme Court if deeired. The procese ie initieted when the Attorney General eubmite a petition declering the wanted person as eubject to extredition.

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* Extredition Law, 5714-1954, 8 Laws of the Stete of Israel, 145 as amended.

ITALY

Extradition for political offenses is specifically forbidden by the Constitution of the Republic of Italy,[1] while the extradition rules are set forth in the Code of Criminal Procedure,[2] which does not differentiate between political and common crimes with respect to extradition. Consequently, the same procedure is applicable regardless of the nature of the crime for which extradition is requested by a foreign government.

In order for an offender to be extradited from Italy, there must be the consent of the Minister of Justice;[3] however, in the interest of safeguarding the rights of the offender, said consent must be preceded by a favorable opinion issuing from the Court of Appeals in whose district the offender is present.[4] Moreover, while there can be no extradition in the absence of a favorable opinion of the Court, the Minister can refuse the requested extradition notwithstanding the Court's favorable opinion.[5]

Italian legal doctrine considers the granting of extradition, as governed by the Code of Criminal Procedure, to be the reflection of a

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1/ Art. 10, Appendix A, Constitution of the Republic of Italy in M. Cappelletti, et al., The Italian Legal System (1967).

2/ Arts. 661-671, Codice di Procedura Penale in S. Vasta, ed., I Quattro Codici (Piacenza, 1977).

3/ Id., art. 661.

4/ Supra note 2, art. 662.

5/ Id. For commentary, see also F. Antolisei, Manuale di Diritto Penale 99-101 (Milano, 1975).

"mixed system," in which both the executive and judicial branches of government are intended to exercise jurisdiction. 6/

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6/ "Estradizione" in A. Azara, et al., eds., 6 Novissimo Digesto Italiano 1018 (Torino, 1960).

MEXICO

Extradition is governed by the Mexican Constitution of 1917 as amended, which in Article 15 states the following:[1/]

> Art. 15. No treaty shall be authorized for the extradition of political offenders or offenders of the common order who have been slaves in the country where the offense was committed. Nor shall any agreement or treaty be entered into which restricts or modifies the guarantees and rights which this Constitution grants to the individual and the citizen.

In keeping with the constitutional provision cited, the Law on International Extradition of December 22, 1975,[2/] provides that under no circumstances can a person who may be submitted to political persecution by the requesting state or who had the status of a former slave be extradited.[3/]

The Extradition Law establishes the procedure for granting extradition in the following paraphrased provisions. All extradition requests are submitted by the foreign state to the Ministry of Foreign Affairs which decides if the extradition is admissible.[4/] If the Ministry of Foreign Affairs admits the extradition, the request is forwarded to the General Attorney of the Republic, which submits the imprisonment order to the competent District Judge.[5/] The Court, after hearing the accused, informs the Ministry of its opinion in the case.[6/] The Ministry of Foreign Affairs, based on the proceedings, and con-

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1/ Constitution of Mexico (as amended) (Washington, Organization of American States, 1972).

2/ Diario Oficial [D.O.], December 29, 1975.

3/ Id. art. 8.

4/ Id. art. 19.

5/ Id. art. 21.

6/ Id. art. 30.

sidering the opinion of the Judge, may grant of deny the extradition request.[7] Only tbe action of habeas corpus can proceed against the decision of the Ministry of Foreign Affairs.[8]

The United Mexican States has agreed on bilateral and multilateral treaties on the matter of extradition, among them the treaties with the United States, the first in 1861, the latest on May 4, 1978;[9] with Belgium in 1881; the United Kingdom in 1886; Guatemala in 1894; Italy in 1899, ratified in 1949; Cuba, Colombia, and Panama in 1930; and the Montevideo Convention of 1933. All of these treaties establish that political offenses and related actions are not extradictable and that decision must be made by the requested State.

Several Mexican authorities consulted do not mention the criteria followed by the political authorities, that is, the Ministry of Foreign Affairs or the Supreme Court, for the extradition of political offenders.[10]

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7/ D.O. art. 30.

8/ Id. art. 33.

9/ Id., January 23, 1979.

10/ F. de la Barra, Estudio de la Ley Mexicana de Extradición (México, Imprenta del Gobierno Federal, 1891), A. Ortiz N., Algunos Aspectos de la Extradición Internacional en la Ley, en los Tratados y Convenciones Vigentes en México y ante los Precedentes de la Suprema Corte de Justicia de la Nación (México, Universidad Autonoma de México, 1950) and J. Palacio B. Extradición y Derecho de Asilo (México, Universidad Autonoma de México, 1966).

SPAIN

The Constitution of Spain of December 27, 1978,[1] states in Article 13, paragraph 3, the following in regard to extradition:

> 3. Extradition shall only be granted in compliance with either a treaty or the law according to the principle of reciprocity. Political crimes are excluded from extradition; acts of terrorism shall not be considered as such political crimes. [2]

The Law on Extradition of December 26, 1958,[3] provides similar provisions on the matter of extradition in accordance with the above-cited constitutional text. Article 6 of the law, paraphrased below, establishes the situations in which extradition is not granted:

> 1. ...in the case of political offenses, unless the action essentially constitutes a common crime or reveals unusual cruelty on the part of the offender, whatever the alleged motives. An assassination attempt against a chief of state, his or her family, or those who exercise governmental functions, is not considered to be a political offense.

The extradition request is presented to the Foreign Affairs Ministry, which in turn forwards it to the Ministry of Justice, which must validate the request by a well-founded argument to be presented to the government which ultimately makes the decision.[4]

In the event the extradition is granted, the law considers a procedure by which a competent criminal court must hear the accused if he or she refuses

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1/ Gaceta de Madrid, December 29, 1978.

2/ "Constitution of Spain of 1978" translated by the Staff of the Hispanic Law Division, Law Library, Library of Congress, Washington, 1979.

3/ E. Gimbernat O., Código de las Leyes Penales 609 (Madrid, Boletín Oficial del Estado, 1977).

4/ Law on Extradition, art. 12.

to be extradited [5] and makes its decision considering only those conditions or issues governed by the treaties or the extradition law.[6]

If the extradition is denied by the criminal court, the decision is not appealable.[7]

The Spanish procedure on extradition has been described as a mixed system in which the government administration handles the first stage of the procedure with the second stage entrusted to the judiciary.[8]

A search of the Supreme Court decisions in regard to the definition of political offenses as applied by the Court in extradition cases did not produce any material.[9]

Extradition between the U.S. and Spain is governed by the treaty of May 29, 1970 and the Supplementary Treaty on Extradition of January 25, 1975, which contains similar provisions to the above-cited Spanish legal sources.[10]

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5/ Law on Extradition, art. 12.

6/ Id. art. 18.

7/ Id. art. 19.

8/ A. Quintano, Curso de Derecho Penal 186 (Madrid, Editorial Revista de Derecho Privado, 1963) and L. Prieto, et al., Derecho Procesal Penal 40 (Madrid, Editorial Temas, 1976).

9/ II Diccionario de Jurisprudencia Penal (Pamplona, Editorial Aranzadi, 1972).

10/ 22 UST 737 and 29 UST 2283

SWEDEN

I. Tha Decision to Extradita

The decision aa to whather or not an alleged criminal should ba extradited to a foreign country ie in Swedan made jointly by the Government (i.e., the Cabinet ministere) and tha Supreme Court.

Tha statutory provisione on this mattar are found in eactions 14-22 of Statute No. 668 of December 6, 1957, on Extradition for Crimee, ae amendad. It follows from these provisions that tha Swedish Government--when it hee received a requeet for the extradition of an alleged criminal through the usual diplomatic channals--will first hear tha highest etate proeecutor and than eend tha patition for extradition to the Supreme Court with a requeet that the Court decide whather or not extradition may be granted lawfully under sactione 1-10 of the Statute on Extradition for Crimes.

Sectione 1-10 contain a number of prohibitions against extradition, including tha ones against extradition of Swedieh citizene (sec. 2) and of persons for political crimes (eecs. 6 and 7). In an extradition casa, further judicial stepe than this determination will normally be before the lower courts and be eubject to review by tha Suprema Court. In addition, it follows from section 16 of the Ststute that a person to be considered for extradition muet be granted baeically the eame due procese protection ae a defendant in a criminal case.

II. Tha Concept of Political Crimee

Sections 6 and 7 of Swadish Statute No. 668 of December 6, 1957, ae amended, provida:[1/]

1/ Translated by Dr. Finn Henriksen.

Sec. 6. Extradition must not be granted for political crimes.

If the committed acts also include a crime of a nonpolitical nature, extradition may be granted for such crime, provided that the committed acts in the individual case are found primarily to have the nature of a nonpolitical crime.

Sec. 7. A person cannot be extradited if in the foreign state he runs the risk--because of his descent, attachment to certain groups in the society, religious or political beliefs, or otherwise because of the political situation--of being subjected to persecution that is directed against his life or freedom or otherwise is of e serious nature. Nor shall he be extradited to a foreign country where he is not secured against being sent to still anothar country where he would be exposed to such risk.

In 1972, the distinction between political and nonpolitical crimes in section 6 was considered by the Swedish Supreme Court in the casa of the Taiwanese citizen Tzu-tsai Cheng, who in New York had been found guilty of the attempted murder of the Taiwanese Vice-Prime Minister Chang Ching-Kuo.[2/]

The Swedish Supreme Court in this case held unanimously that Cheng could be extradited to the United States, and the majority of the Court explained:[3/]

Secondarily, Cheng has pleeded against the requested extradition that the committed acts primarily have the nature of a political crime. It seems beyond doubt that Cheng had political motivations for his acts; one must assume that the purpose of the attempted murder was to changa the internal political situation in Taiwan--if not immediately, then at laast at some time in the future. However, the fact that an act has a political motivation is not sufficient to make it a political crime, as this term is used in section 6 of the Statute on Extradition. This applies especially when we are daaling with the kind of crimes that generally are considered to be the most heinous, such es murder and the lika.

2/ 1972 Nytt Juridisk Arkiv, Avd. 1, p. 358.

3/ Supra note 1.

During the actual extradition from Sweden to the United States, Cheng was hospitalized in England, and he succeeded there in getting the highest English court, the House of Lords, to consider his case in 1973. However, in the House of Lords a majority of three, against a minority of two, found that Cheng had to be extradited to the United States because the crime he had committed did not qualify as an "offense of a political character," as this term is used in section 3 in the English Extradition Act of 1870.

In a law review article, H. Dadelius compared the Swedish Supreme Court decision with that of the House of Lords and in it included substantial excerpts in English of the latter.[4/] Dadelius found that the House of Lords decision was substantially more analytical and informative than that of the Swedish Supreme Court, and he expressed the hope that the Swedish court in the future would adapt some of the analytical approaches used by the House of Lords. However, the differences between the judgments may also be explained by the fact that the Swedish decision was one made by a practically unanimous court, while the English decision was made by a highly divided court.

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4/ H. Dadelius, "Offence of a political character," 58 Svensk Juristtidning 540-545 (1970). (Appendix)

Appendej

Svensk Juristtidning

grundad av Tore Almén och Karl Schlyter

utgiven under redaktion av
Sten Rudholm — Jan Hellner
Carl Holmberg — Stig Strömholm
Bengt Westerling — Hans Danelius

1973

Femtioåttonde årgången
Stockholm
Aktiebolaget P. A. Norstedt & Söner

mot kaos som de alltfler unilaterala åtgärderna leder till.

En annan betydelsefull skillnad mellan de tidigare havsrättskonferenserna och denna är agendans omfattning. 1958—1960 kom fyra konventioner till medan havsbottenkommittén skall dryfta ett drygt 70-tal ämnesområden. Självfallet kommer det stora flertalet inte att föranleda några konventionsbestämmelser. Men om havsrättskonferensen skall få ett positivt resultat måste den lösa åtminstone närmare 10-talet viktiga frågor såsom territorialvattengränsen, genomfartsrätten i sund, kuststaternas rätt till tillgångarna i havet resp. på och i havsbottnen, reginien för och administrationen av den internationella havsbottnen, marin förorening, vetenskaplig forskning m. m.

Eftersom staternas intressen varierar starkt mellan de skilda frågorna, kan den politiska lösningen knappast få någon annan form än "paketlösningens". Det måste nämligen anses uteslutet att en stat gör några för den väsentliga medgivanden i en viss fråga utan att den samtidigt är försäkrad om vilken "kompensation" den kommer att få i de andra frågorna. De många och komplicerade frågorna som måste ingå i "paketet" gör det proceduretlt svårt att nå den slutliga lösningen. Att dela upp frågorna på flera delkonferenser torde knappast vara en framkomlig väg, inte ens om man kommer överens om att resultaten av delkonferenserna inte blir slutgiltiga förrän slutkonferensen hållits. Även om staterna ges rätt att bryta upp delkonferensernas resultat i samband med den slutliga politiska uppgörelsen, anses nämligen det psykologiska motståndet mot att på nytt behandla ett tidigare provisoriskt färdigbehandlat ämne så stort, att det bara i undantagsfall kan åstadkommas i praktiken. Ej heller torde det vara realistiskt att föreställa sig att en enda konferens skall mäkta med att både skriva konventionerna och nå fram till den politiska uppgörelsen. Såvitt nu kan bedömas torde den enda möjligheten vara att söka nå den politiska överenskommelsen före slutkonferensen. Detta förhållande utgör också en förklaring till att havsbottenkommitténs arbete framskridit så långsamt av de synliga resultaten att döma.

Lennart Myrsten

"Offence of a political character"

Utlämningen av taiwanesen Tzu-Tsai Cheng väckte under sensommaren 1972 stor uppmärksamhet i svenska massmedia. USA:s regering hade begärt Cheng utlämnad från Sverige på grund av amerikansk domstols dom, varigenom Cheng funnits skyldig till försök till mord på Taiwans vice premiärminister Chiang Ching-Kuo, son till Chiang Kai-Shek. Brottet hade begåtts den 24 april 1970 i New York.

Cheng motsatte sig utlämningen och hävdade bl. a. att den gärning han dömts för övervägande haft karaktären av politiskt brott. Genom beslut den 22 augusti 1972 fann Högsta domstolen att hinder enligt utlämningslagen inte mötte mot utlämningen. Den 31 augusti 1972 beslöt Kungl. Maj:t att Cheng skulle utlämnas till USA.

Utlämningsbeslutet verkställdes den 4 september 1972. Efter mellanlandning i Köpenhamn fördes Cheng till London, där resan avbröts på grund av Chengs hälsotillstånd.

Från amerikansk sida begärdes att Cheng skulle utlämnas från Storbritannien. Den 30 november 1972 förordnade Chief Metropolitan Magistrate i London att Cheng skulle hållas i förvar i avbidan på hans utlämning till USA. Cheng vände sig därefter med en s. k. habeas corpus-ansökan till Divisional Court of the Queen's Bench Division. Sedan domstolen avslagit denna ansökan, besvärade sig Cheng hos House of Lords. Han gjorde därvid, liksom i förfarandet i Sverige, gällande att han inte kunde utlämnas, därför att det brott för vilket hans utlämning begärts var av politisk natur.

Den 16 april 1973 avslog House of Lords besvären med tre röster mot två. De vota som avgavs av de i beslutet deltagande domarna synes ha ett betydande allmänt intresse och skall i utvalda delar återges i det följande. Av intresse är också att jämföra dessa vota med motiveringen i den svenska Högsta domstolens beslut.

Rättsgrundlaget är på denna punkt någotsånär likartat i de båda länderna. Enligt 6 § i den svenska utlämningslagen får utlämning inte beviljas för politiskt brott. Om gärningen också innefattar brott av icke politisk beskaffenhet, får utlämning beviljas för det brottet om gärningen i det särskilda fallet prövas övervägande ha karaktären av ett icke politiskt brott. Enligt Section 3(1) i 1870 års Extradition Act gäller bl. a. att "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character".

I sitt beslut i fallet Cheng uttalade Högsta domstolen bl. a.:

> Otvivelaktigt har Cheng haft politiska motiv för sitt handlande; syftet med mordförsöket måste antagas ha varit att åstadkomma en ändring av de inrikespolitiska förhållandena i Taiwan, om ej omedelbart så i varje fall på längre sikt. Att en gärning har politiska motiv är emellertid ej tillräckligt för att göra den till politiskt brott i den mening som avses i 6 § utlämningslagen. Särskilt gäller detta när det är fråga om de allmänt sett grövsta brotten som mord och liknande. I detta fall föreligger ytterligare omständigheter som måste anses minska den betydelse man kan tillmäta de politiska motiven. Av utredningen framgår sålunda, att mordförsöket begåtts utan samband med något verkligt försök att omstörta den politiska ordningen i Taiwan och att det närmast är att betrakta som en isolerad våldshandling, vilken i stor utsträckning förberetts av Cheng på egen hand. Vidare har gärningen icke varit direkt riktad mot det land som nu begär utlämning av Cheng. Med hänsyn till dessa omständigheter och till vad som i övrigt framkommit om gärningen får denna vid prövning enligt 6 § utlämningslagen anses övervägande ha karaktären av ett icke politiskt brott.

I House of Lords bestod majoriteten av Lord Hodson, Lord Diplock och Lord Salmon. Minoriteten, som ville bifalla Chengs besvär, utgjordes av Lord Wilberforce och Lord Simon of Glaisdale.

Lord Hodson framhöll att Chengs brott begåtts som ett led i en politisk meningsmotsättning med de styrande i ett annat land än det som begärt hans utlämning. Han påpekade att medlemmar av politiska organisationer kan begå alla slags brott för att främja sina politiska syften men att alla sådana brott inte fördenskull blir "offences of a political character" enligt Extradition Act. Han tillade: "Political character in its context, in my opinion, connotes the notion of opposition to the requesting state. The applicant was not taking political action vis à vis the American Government and the American Government is not concerned with the relations between America and Taiwan in asking for extradition but is concerned

only with enforcing the criminal law."

Lord Diplock framhöll att med "offence of a political character" i Extradition Act inte kunde förstås enbart sådana brott som i sig hade ett politiskt element, t. ex. förräderi och uppror. Sådana brott var överhuvudtaget inte omfattade av Extradition Act, som däremot avsåg ordinära brott av allvarlig art. Följaktligen måste det finnas omständigheter som kunde göra sådana ordinära brott, t. ex. mord och mordförsök, till brott av politisk karaktär. Lord Diplock utvecklar sin syn på tolkningen av begreppet "offence of a political character" på följande sätt:

My Lords, the noun that is qualified by the adjectival phrase "of a political character" is "offence". One must, therefore, consider what are the juristic elements in an offence, particularly one which is an extradition crime, to which the epithet "political" can apply. I would accept that it applies to the mental element: the state of mind of the accused when he did the act which constitutes the physical element in the offence with which he is charged. I would accept, too, that the relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged; for, in the case of none of the extradition crimes, can this properly be described as being political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused had robbed a bank in order to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet "political". For politics are about government. "Political" as descriptive of an object to be achieved must, in my view, be confined to the object of over-throwing or changing the government of a State or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a "political act", whether or not it was done within the territory of the government against whom it was aimed. But the question is not simply whether it is political qua "act" but whether it is political qua "offence".

Lord Diplock ansåg vidare att en "offence of a political character" enligt Extradition Act inte kunde anses föreligga "if the only 'political' purpose which the offender sought to achieve by it was not directed against the government or governmental policies of that State within whose territory the offence is committed and which is the only other party to the trial and punishment of the offence". Syftet med undantagsbestämmelsen kunde inte vara att garantera en brottsling straffrättslig immunitet för ett allvarligt brott som begåtts av politiska motiv, eftersom "if committed in the United Kingdom, the offender would have been convicted and punished for it irrespective of any political motive directed against the Government of any foreign State which inspired the offender to do it". Syftet med undantagsbestämmelsen beskrevs i stället av Lord Diplock på följande sätt:

The purpose of the restriction, as it seems to me, was two-fold. First, to avoid involving the United Kingdom in the internal political conflicts of foreign States. To-day's Garibaldi may well form to-morrow's Government. And secondly, the humanitarian purpose of preventing the offender being surrendered to a jurisdiction in which there was a risk that his trial or punishment might be unfairly influenced by political considerations.

Misstanken att den stat som begär utlämningen kunde ha politiska motiv bakom sin begäran kunde emellertid enligt Lord Diplock inte föreligga i

fråga om "a fugitive criminal who, though a political opponent of the Government of some other State, was not a political opponent of the State demanding his surrender", och inte heller "would there appear to be any greater risk that his trial or punishment for the offence in such a State might be unfairly influenced by political considerations than if he had committed the same offence in the United Kingdom and been tried and punished for it here". Även på grundval av en sådan "purposive construction" av Extradition Act kom Lord Diplock således till slutsatsen att "an offence of a political character for the purposes of the restriction was intended to be confined to offences in which the political purpose sought to be achieved by the offender was directed against the Government of the State seeking his surrender".

Inte heller Lord Salmon ansåg det föreligga något godtagbart skäl "for construing the Act of 1870 as offering asylum to anyone other than a man who has committed a crime directed against the régime of the requesting State and which, in that sense, was a crime of a political character". Han erinrade också om Italiens beslut att inte till Frankrike utlämna Pavelic och Kwaternic, de två kroater som 1934 i Marseille mördade kung Alexander av Jugoslavien och den franske utrikesministern Barthou. Lord Salmon kommenterade detta fall på följande sätt:

> We have been referred to the case concerning the murder in France in 1934 of King Alexander of Jugo-Slavia and M. Barthou, the French Foreign Minister by two Croats named Pavelic and Kwaternic who did not approve of the Jugo-Slav régime or of its support by France. The murder was intended as a political blow at that régime and at France for supporting it. The two Croats escaped to Italy. France requested their extradition which the Italian courts refused on the ground that their crime was of a political character. It is not for me to express any view about the correctness of that decision. If Italian law is the same as ours, the murder of M. Barthou was clearly an offence of a political character within the meaning of those words in the Treaty and the relevant Italian legislative enactment, but the murder of King Alexander was not. It is not plain from the somewhat attenuated report of this case what were the precise grounds for the Italian court's decision. It seems, however, that the court may have considered that any crime incidental to or arising out of an offence of a political character is deemed also to be such an offence and that therefore the assassins of King Alexander were entitled to the same immunity from extradition as they were in respect of the murder of M. Barthou. This point has never been considered by our courts. But if it is a valid point, it underlines the necessity for construing the words "of a political character" strictly in their context in the Act of 1870.

Lord Simon of Glaisdale, till vars votum Lord Wilberforce anslöt sig, ansåg att stor vikt måste tillmätas den grundläggande tolkningsregeln att ord och uttryck i en lag bör presumeras vara använda i sin normala och naturliga betydelse. Om parlamentet 1870 hade velat begränsa undantaget till att gälla sådant brott av politisk karaktär som begås mot den stat som begär utlämningen, skulle ingenting ha varit lättare än att ange denna begränsning i lagtexten. Lord Simon tillade:

> By reason of this primary and golden rule, therefore, the words "offence ... of a political character" must be read in their natural ordinary and literal sense, without the addition of the words "against (or, in respect of) the foreign State demanding such surrender", which are not in the Act. Asked whether the appellant's crime was an "offence of a political character", even the most harassed commuter from Clapham would, I think, undoubtedly an-

swer, "Of course". Indeed, I cannot conceive that it would occur to anyone except a lawyer that the appellant's offence could possibly be described as other than of a political character.

Men även en juridisk analys ledde enligt Lord Simons mening till samma resultat. Han hänvisade till Oppenheims verk "International Law" (8 uppl. utg. av Lauterpacht, 1955), där det sägs att "many writers consider a crime 'political" (i) if committed from a political motive, others call 'political' (ii) any crime committed for a political purpose; again, others recognise such a crime only as 'political' (iii) as was committed both from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term 'political' crime to (iv) certain offences against the State only, such as high treason, *lèse-majesté* and the like". Såvitt avsåg begreppet "offence of a political character" i Extradition Act var det fjärde tolkningsalternativet uteslutet, och Lord Simon framhöll att det inte i något av de övriga tre alternativen angavs att brottet skulle vara riktat mot den stat som begärde utlämningen. "So the leading jurists in this field would concur with the man in the street that the appellant's crime was 'an offence of a political character' ", konkluderade Lord Simon.

Det fanns enligt Lort Simon inte heller stöd för en restriktiv tolkning av begreppet "offence of a political character", om man tog hänsyn till den situation som rådde, när parlamentet antog Extradition Act 1870. Lord Simon gjorde härvidlag följande historiska tillbakablick:

> Garibaldi and Kossuth, criminals in the eyes of the absolute governments of Europe, had been subjects of wild enthusiasm on their visits to London; and it is inconceivable that this country would have handed the former over to King Bomba on the ground that he had been responsible for the death, not of a Neapolitan, but of an Austrian, soldier or official in the Kingdom of the two Sicilies. Only a few years before the 1870 Act there had occurred the Orsini affair. Orsini was an Italian republican follower of Mazzini. He had thrown a bomb at Napoleon III. He was discovered to have had links with some Italian refugees in London and the explosives had been made in England. In response to French protests Palmerston proposed to introduce a Conspiracy to Murder Bill to make it a felony, instead of merely a misdemeanour, to plot in England to murder someone abroad. This aroused such indignation that Palmerston, normally a highly popular and powerful minister, suffered parliamentary defeat, and his Government fell.

En annan faktor av betydelse vid tolkningen var enligt Lord Simon det förhållandet att Extradition Act innefattade avvikelser från reglerna i common law, som skyddade den enskilde mot att tas i förvar med sikte på senare utlämning. Bestämmelser som innefattar sådana avvikelser bör tolkas restriktivt, vilket i sin tur innebär att inskränkningar i utlämningsbefogenheten, t. ex. vid politiska brott, i den enskildes intresse bör tolkas extensivt. Lord Simon menade vidare att lagen borde tolkas så att den bäst överensstämde med internationell rätt. Han erinrade därvid om morden på kung Alexander och utrikesminister Barthou och om Italiens vägran att utlämna mördarna till Frankrike under åberopande av att brotten, d. v. s. även mordet på kung Alexander, var politiska brott.

Slutligen framhöll Lord Simon att lagtolkningen borde vara förnuftig och rimlig. För att visa att den restriktiva tolkningen av begreppet "offence of a political character" skulle leda till orimliga resultat anförde han följande exempel:

Take the *Pavelic* case, and suppose the suspects had fled to England and not Italy. On the respondent's construction of the 1870 Act King Alexander's murder would have been an extraditable offence, but not that of M. Barthou; though the acts were virtually simultaneous, their common motives and purposes were political, and their political character was only distinguishable in that Barthou symbolised French support for the Yugo-Slav régime whereas King Alexander symbolised that régime itself. If it could be ascertained which assassin killed which victim, one would be extradited and the other not.

Then take the hypothetical case of an attempted assassination, not of the Vice-Premier of Nationalist China, but of the Vice-President of the U.S. Counsel for the respondent accepted that this would be "an offence of a political character" if committed solely in protest against U.S. support of Chiang Kai-Shek's Government and if perpetrated on U.S. territory—say, at the U.S. end of the Niagara Bridge. But if the purporting assailant followed the Vice-President across the bridge, and made the attempt at the Canadian end of the bridge, it would in some extraordinary way cease to be an offence of a political character. Its correct characterisation if the attempt were made laterally as the Vice-President was actually crossing the frontier would, I think, strain the subtlety even of a scholastic metaphysician.

Take, finally, two other actual assassinations, and apply the respondent's argument. In 1898 an Italian anarchist, Lucheni, murdered the Empress Elizabeth of Austria at Geneva. Asked why, he replied, "As part of the war on the rich and great... It will be Humbert's turn next." In 1900 another Italian anarchist, Bresci, duly murdered King Humbert of Italy near Milan. Between these two events, at an international conference in Rome, Great Britain (together with Belgium and Switzerland) refused to give up her traditional privilege of asylum or to agree to surrender suspected anarchists upon demand of their native countries. — — — Yet, if both assassins had taken refuge in England, on the respondent's argument Bresci's crime would have been an offence of a political character under section 3(1) and non-extraditable, while Lucheni's, similar in all respects except the fortuitous and temporary location of the victim, was not an offence of a political character and was therefore extraditable.

Det torde inte inträffa ofta att Högsta domstolen och House of Lords på talan av samma klagande kallas att ta ställning till en likartad rättsfråga. Redan med hänsyn härtill är det beslut som meddelats av House of Lords i fallet Cheng värt att uppmärksammas i Sverige. Dessutom kan man konstatera att House of Lords i fråga om tolkningen av det oklara begreppet "offence of a political character" anfört många intressanta synpunkter som skulle kunna vara vägledande även vid tillämpningen av motsvarande bestämmelse i den svenska utlämningslagen.

Slutligen kan noteras att en jämförelse mellan de båda högsta instansernas avgöranden i fallet Cheng på ett slående sätt illustrerar skillnaden i rättslig tradition mellan Sverige och England. Det är svårt att undertrycka en stilla och säkert fåfäng förhoppning om att de engelska lorderna skulle lyckas förmedla något av sin färgrika retorik till sina mera ordkarga svenska kolleger.

Hans Danelius

Den danske aktieretsreform

I januar 1973 fremlagde den danske handelsminister i folketinget forslag til en ny aktieselskabslov til afløsning af loven af 1930. Samtidig forelagde han forslag til lov om "anpartsselskaber" ad modum det kontinentale GmbH/SARL (Gesellschaft mit beschränkter Haftung/Société à responsabilité limitée). Efter at dette er skrevet, har folketinget endeligt vedtaget lovforslagene, således at de kan træde i kraft pr. 1. januar 1974.

SWITZERLAND

The Swiss Law of January 22, 1892, on Extradition to Foreign Countries forbids the extradition of a person accused or convicted of a political offense.[1/] However, when the fact for which such action is requested constitutes a common offense, the extradition is allowed even though the accused person might allege a political reason or purpose.

The Law gives to the Swiss Federal Tribunal (Supreme Court) the power to independently assess the political or nonpolitical character of each offense according to the facts of the case.[2/]

On the other hand, in each situation the extradition of a person must be approved by the Federal Council (Swiss Government). The Council shall grant the extradition only under the condition that the accused will not be investigated or punished for a political offense, even for political reasons or purposes.

Prepared by Dr. George Roman
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October 1981

1/ Art. 10(1) in 3 Recueil systématique des lois et ordonnances, 1848-1947, 501.

2/ Id. art. 10(2).

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LAW LIBRARIAN OF CONGRESS

RE: LLS 82-66
EXTRADITION

Attention: David Beier

Dear Mr. Rodino:

This is a follow-up to our October 29, 1981 reply to your October 15, 1981 telephone request concerning extradition and who in the referral state determines if the crime is a political offense.

The enclosed reports on this subject have been prepared for you by the staff of the American-British Law Division and cover Australia, India, Ireland, New Zealand, and the United Kingdom.

Please let us know if we can be of further assistance.

Sincerely,

Carleton W. Kenyon

Carleton W. Kenyon
Law Librarian

Enclosures

Honorable Peter W. Rodino, Jr.
Chairman, House Committee on
the Judiciary
House of Representatives
207 Cannon Building
Washington, D. C. 20515

AUSTRALIA

The Australian statutes governing extradition of offenders to foreign states and other Commonwealth (British) countries require that the Attorney-General of Australia refuse the extradition of political offenders. Under the Extradiction (Foreign States) Act, 1966-1973, §15,[1] on receiving a requisition for extradition from a foreign state, the Attorney-General may, in his discretion, authorize a magistrate to issue a warrant for the arrest of the fugitive. However, under §14 the Attorney-General must not authorize such an arrest:

> if there are substantial grounds for believing
>
> (a) the requisition for the surrender of the fugitive, although purporting to have been made in respect of an offence for which, but for this section, he would be liable to be surrendered to that state, was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;

The Extradition (Commonwealth Countries) Act, 1966-1973, §11[2] requires that the Attorney-General not authorize the arrest of a political offender in similar terms.

Where the Attorney-General decides not to accede to a request for extradition, there is no power in the courts to compel him to do so.[3]

Prepared by Kersi Shroff
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October 1981

1/ 5 Acts Austl. P. 671 (1975).

2/ Id. at 637.

3/ Extradition (Foreign States) Act, 1966-1973, §15(2).

INDIA

A requisition for the surrender of a fugitive criminal of a foreign state may be made to the Government of India.[1] On receiving the requisition, the government may issue an order to any magistrate who would have had jurisdiction to inquire into the offense, if it had been an offense committed within the local limits of his jurisdiction, directing him to inquire into the matter. The magistrate, thereupon, issues a warrant for the arrest of the fugitive criminal.

When the criminal is brought before him, the magistrate investigates the case in the same manner and with the same jurisdiction and authority as if the case were triable by a court of session or High Court. The magistrate receives such evidence as is produced in support of the requisition of the foreign state and also on behalf of the criminal to show whether or not the offense, of which the fugitive criminal is accused, is of a polital character and therefore not an extraditable offense. If a prima facie case is not made out in support of the requisition of the foreign state, the magistrate shall discharge the fugitive criminal. If a prima facie case is made out in support of the requisition, he may commit him to prison to await the orders of the Central Government. Simultaneously, the magistrate shall report to the Central Government and shall forward, together with the report, any written statement which the fugitive criminal may desire to submit for consideration.

1/ The Extradition Act, 1962, No. 34.

Upon receipt of the report and the statement, if the government is of the opinion that the fugitive criminal ought to be surrendered to the foreign government, it may issue a warrant of arrest for the custody and removal of the criminal and for his delivery at a place and to a person to be named in the warrant.

In view of the aforesaid facts, apparently, the court and the government have a mutually complimentary function for the determination of an extraditable offense because even though the final decision lies with the government, it must be based on the report and prior consideration of the judicial authority.

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IRELAND

A political offendar may be refused extradition from Ireland either at the direction of the High Court of Ireland or the Irish Minister for Justice. The direction may be given by the Court or the Minister where they are of the opinion that:

50(2)(a) the offence to which the warrant relates is—

(i) a political offence or an offence connected with a political offence, or

(ii) an offence under military law which is not an offence under ordinary criminal law, or

(iii) a revenue offence, or

(b) there are substantial reasons for believing that the person named or described in the warrant will, if removed from the State under this Part, be prosecuted or detained for a political offence or an offence connected with a political offence or an offence under military law which is not an offence under ordinary criminal law, or

(c) the offence specified in the warrant does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months.1/

The direction may be given either on application made by the offender or by the question being referred to the Court by the Minister.2/

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1/ The Extradition Act, 1965, No. 17, §50(2).

2/ Id. §50(3).

NEW ZEALAND

In New Zealand, a request for the surrender of a person to the authorities of a country with which there exists an extradition treaty or agreement must be made to the Minister of External Affairs. This individual is then obliged to transmit the matter to the Minister of Justice who may issue a warrant of arrest. If, however, the Minister of Justice is of the opinion that the offense is one of a political character he may refuse to do so.[1/] Furthermore, if the offender is arrested, the Minister may order his release at any time.[2/] If, on the other hand, he or she is arrested, a hearing in a Magistrate's Court must be held.[3/] One ground for discharge is that the offense for which the individual is being held is of a political character.[4/] An appeal against the decision of the magistrate lies to the High Court of Justice.[5/]

Extradition from New Zealand to other parts of the Commonwealth is governed by the United Kingdom's Fugitive Offenders Act of 1881.[6/] Under this law, the Minister of Justice has the power to discharge a person

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1/ The Extradition Act, 1965, 1965 Stat. N.Z., No. 44, § 6.

2/ Id.

3/ Id. § 8.

4/ Id. § 9.

5/ Id. § 10, as amended by the Judicature Amendment Act, 1979, 1979 Stat. N.Z., No. 124.

6/ 44 & 45 Vict., c. 69.

whose return has been requested if he believes this to be "fit"[7] and the High Court may also discharge such a person where the case is of a "trivial nature" or where it would be "unjust, oppressive, or too severe a punishment" to comply with the request.[8] Additionally, New Zealand strengthened this law in 1976 by passing an amendment that expressly provides that no person shall be returned to another Commonwealth country if the offense for which he is sought is of a political character.[9] In the case of extradition to Australia, Fiji, Western Samoa, and several other small Pacific jurisdictions, only the courts can determine whether the offense is political in nature. In the case of extradition to all other Commonwealth jurisdictions, the Minister of Justice is also competent to make this preliminary determination.[10]

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7/ 5 Repr. Stat. N.Z. 3868, § 4.

8/ Id. § 10.

9/ Id. § 29a, as added by the Fugitive Offenders Amendment Act, 1976 Stat. N.Z., § 7.

10/ Id.

UNITED KINGDOM

The Extradition Act, 1870[1] grants the courts and the Secretary of State (in practise the Home Secretary) the authority to refuse the extradition of political offenders to foreign states. Section 3(1) provides:

> 3. Restrictions on surrender of criminals
>
> The following restriction shall be observed with respect to the surrender of fugitive criminals:
>
> (I) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character:

Under §9 of the Act, a magistrate hearing an extradition case is required to receive any evidence showing that the offense in question was of a political nature. Accordingly, it is the magistrate's duty to determine on the whole evidence whether the accused was convicted of a political offense.[2]

The statute governing the surrender of fugitive offenders between countries in the Commonwealth (British), the Fugitive Offenders Act, 1967, §4[3] similarly provides:

> 4. General restrictions on return
>
> (I) A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, to the court of committal or to the High Court or High Court of Justiciary on an application for habeas corpus or for review of the order of committal—

1/ 33 & 34 Vict., c. 52.

2/ R. v. Governor of Brixton Prison, Ex Parte Kolczynski, [1955] 1 Q.B. 540, 553.

3/ c. 68.

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

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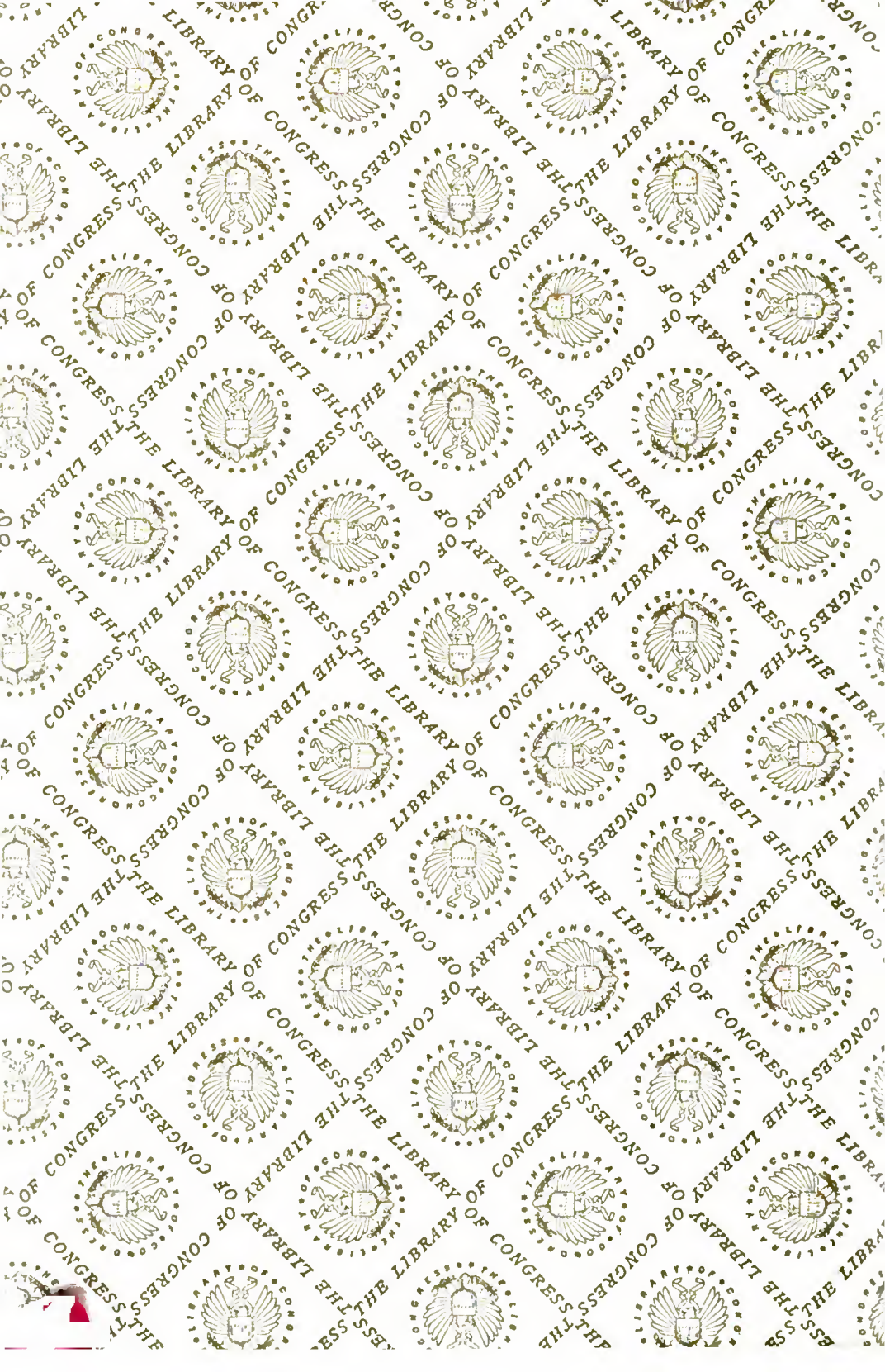
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